United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

75-7669

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Judgment Creditor-Appellee,

—against—

MORTON L. ANNIS,

Defendant-Judgment Debtor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPENDIX

RICH KRINSLY POSES KATZ & LILLIENSTEIN
Attorneys for Defendant-Judgment Debtor-Appellant
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867-7200

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New York, New York 10020
489-8230

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DATE	PROCEEDINGS
06-23-75	Filed deposition of [illegible]
06-23-75	Filed deposition of [illegible]
06-23-75	Filed deposition of [illegible]
06-23-75	Filed deposition of [illegible]
06-23-75	Filed deposition of [illegible]
06-23-75	Filed deposition of [illegible]
06-23-75	Filed deposition of [illegible]
06-26-75	Filed true copy of order from the USCA with opinion attached. ORDERED that the judgment of the District Court is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant. Clerk Judgment entered. Clerk (no bill of costs or statement attached) mm
08-18-75	Filed deposition of Lorraine M. Kolakowski on May 8, 1973 at 3:30 p.m.
10-06-75	Filed OPINION #41201..Deft. Annis moves to reduce what he calls a "monthly income execution." Pltf. cross-moves for an installment payment order, requiring deft. to pay plaintiff $3,880 per month. [illegible] the parties are directed to settle an order on ten days' notice vacating the execution of 7-21-75; vacating the restraining notice dated [illegible] General Cigar Corp.; and providing an installment payment order directing defendant to make installment payments to pltf. of $3,880 [illegible] per month. Settle order. [illegible] J. mm
10-30-75	Filed ORDER that the court's decision of May 23, 1973, denying defendant's motion to vacate the Restraining Notice issued to General Cigar Corp., dated [illegible] is recalled and such Restraining notice is vacated. The execution of [illegible] is vacated. Morton L. Annis, the deft. Judgment debtor is directed to pay as indicated herein. Upon the acceleration of the payment of the principal amount of the judgment, as a result of the payments not provided for herein, the amount of the installment payments shall be adjusted accordingly. [illegible]
10-30-75	Filed deft's reply affdvt. of Leslie D. Corwin in opposition to proposed counter-order.
11-19-75	Filed pltff's request for production of documents.
11-19-75	Filed pltff's notice of taking deposition of National Bank of [illegible] on 12-04-75.
11-25-75	Filed Deft's-Judgement Debtor, Notice of Appeal to the U.S.C.A. from an order entered on 10-30-75. [illegible]
12-03-75	Filed Order to show cause to adjudge deft in contempt [illegible]
12-10-75	Filed affdvt of [illegible] to punish the deft for contempt.
12-10-75	Filed [illegible] reply affdvt in support of motion to adjudge deft in contempt [illegible]
12-10-75	Filed Deft-Judgt Debtor affdvt & Notice of Cross-Motion [illegible] an order.
12-10-75	Filed MEMO ENDORSEMENT on Deft-Judgt Debtor affdvt & Notice of Cross Motion [illegible] Motion DENIED in all respects. SO ORDERED. [illegible]
12-18-75	Filed Order adjudging deft in contempt [illegible] Morton L. Annis is guilty of contempt of this Court. Ordered that [illegible] pay a fine in the sum of [illegible] together with [illegible] fees, such fine and fees to be payable to [illegible] pltff, payment of [illegible] entered September [illegible] confined to the New York Metropolitan Correction Center until the [illegible] of [illegible] together with the costs, are paid, and that [illegible] receipt of a certified copy of this order, be directed to take said [illegible] wherever he may be found, and transport and deliver him [illegible] Correction Center of NY and [illegible] (5) months. [illegible]

DATE	PROCEEDINGS
12-22-75	Filed Deft-Judg Debtor Notice for stay of execution of contemp order & Affdvt with MEMO INDORSEMENT on same. MOTION DENIED, ad ORDERED---CARTER?,J. (c/n)
01-01-76.	Filed Pltff's affdvt of Services in support of request for legal fees incurred in connection with the motion to adjuge Deft in contempt.
1-5-76	Filed notice bo appeal of deft-judgment debtor from a certain order made and entered on December 18-75, m/n

DSA-3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD., Plaintiff, -against- MORTON L. ANNIS, Defendant.	71 Civ. 782 (RLC) ORDER TO SHOW CAUSE TO ADJUDGE DEFENDANT IN CONTEMPT

Upon reading and filing the annexed Affidavit of VICTOR A. KOVNER, sworn to the 3rd day of December, 1975, and the exhibits annexed thereto including the Order of this Court signed and entered on the 30th day of October, 1975, and on all the pleadings and prior proceedings heretofore had herein, IT IS HEREBY ORDERED, THAT ~~let~~ MORTON L. ANNIS show cause before this Court, at a stated term for the hearing of motions to be held at the United States Courthouse, Southern District of New York, Room 705 36, Foley Square, New York, New York on the 9th day of December, 1975 at 9:45 o'clock in the fore noon, or as soon thereafter as counsel can be heard why an Order pursuant to Local Civil Rule 14 should not be made herein, adjudging the said MORTON L. ANNIS in contempt of this Court to be dealt with accordingly and granting such relief

to Plaintiff as may be proper, including reasonable attorneys fees on this application because of the willful failure of the said MORTON L. ANNIS to obey, comply with and carry out the provisions of the Order of this Court entered herein on the 30th day of October, 1975 to make installment payment in satisfaction of a judgment to Plaintiff on October 31, November 1 and December 1, 1975, it is further

ORDERED, that sufficient reason appearing therefor, PERSONAL service of a copy of this Order and the papers on which it is granted on the firm of Rich, Krinsly, Poses, Katz & Lillienstein, attorneys of record for the said MORTON L. ANNIS in this action, on or before the 3rd day of December, 1975 BY 5:00 PM shall be sufficient service of this Order.

Dated: New York, New York
December 3d 1975.

/S/ ROBERT L. CARTER
U.S.D.J.

kd

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD., Plaintiff, -against- MORTON L. ANNIS, Defendant.	71 Civ. 782 (RLC) AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

VICTOR A. KOVNER, being duly sworn, deposes and says:

1. I am a member of the firm of Lankenau Kovner & Bickford, trial counsel and attorneys of record for WEITNAUER TRADING COMPANY, LTD., the Plaintiff in this proceeding. I submit this affidavit in support of Plaintiff's motion that Defendant, MORTON L. ANNIS, be ordered to show cause before this Court why an order should not be made adjudging him in contempt of this Court because of his willful failure to obey, perform and comply with the Order of this Court signed and entered October 30, 1975, a copy of which is annexed hereto as EXHIBIT "A" (the "Order").

2. On or about June 13, 1974, judgment was entered in Plaintiff's favor in the amount of $182,065.44 with appropriate interest (the "Judgment"). The Judgment was affirmed by the Court of Appeals of the Second Circuit on or about the 28th day of May, 1975. No part of the Judgment has been satisfied.

3. On or about the 1st day of May, 1975 the Court heard argument on the cross motion of Plaintiff for an installment payment order, pursuant to § 5226 of the New York Civil Practice Law and Rules. The Court rendered its decision granting Plaintiff an installment payment order on or about October 1, 1975. On Notice of Settlement, the Court on or about the 30th day of October, 1975 signed and entered an Order directing Defendant to make specific installment payments.

4. Among other things, the Order directed Defendant to pay by bank or certified check to the order of Lankenau Kovner & Bickford, as attorneys for Plaintiff, in each and every month on the first day thereof, for a five-year period, calculated from May 1, 1975, the aggregate sum of $4,253.93, consisting of principal of $3,000 and

interest of $1,253.93.

5. The Order further directed the Defendant to pay in the same fashion and on or before October 31, 1975, the aforesaid installment payments for the months of May, June, July, August, September and October 1975 aggregating $25,523.58. The Order directed that such sum be paid from the fund of $26,041.67 previously accrued by General Cigar Corp. for Defendant's benefit.

6. Upon learning that the Court had signed the Order, I telephoned William P. Laino, Esq. of the firm of Mudge Rose Guthrie & Alexander, attorneys for General Cigar Corp. I was advised by Mr. Laino that the monies accrued for Defendant's benefit had been released by General Cigar Corp. and paid over to Rich, Krinsly, Poses, Katz & Lillienstein, Esqs., attorneys for Defendant. Mr. Laino also advised me that General Cigar Corp. was advised to make the monthly payments thereafter due to MORTON L. ANNIS directly to him.

7. Thereafter I spoke with Leslie Corwin, Esq. of the firm of Rich, Krinsly, Poses, Katz & Lillienstein who advised me that his firm had received the sum of $26,041.67 from General Cigar Corp.; that his firm had deducted from

such sum certain legal fees due and owing to it by Defendant and that the balance of said sum had been forwarded by his firm to Defendant.

8. The Defendant has failed to make the payment of $25,523.58 due as of October 31, 1975; the Defendant further has failed to make the monthly installment payments of $4,253.93 due as of November 1, 1975 and December 1, 1975. Accordingly, the Defendant is in violation of the Order of this Court and he is now in arrears in the amount of $34,031.34.

9. On or about the 24th day of November, 1975 my firm was served by Rich, Krinsly, Poses, Katz & Lillienstein with a Notice of Appeal to the Court of Appeals for the Second Circuit (annexed hereto as EXHIBIT "B") advising of Defendant's appeal from those portions of the Order as to which the Defendant already is in default as well as additional portions. No stay of the Order has been granted and I was advised by Mr. Corwin of that firm that no application for a stay had been sought.

10. When I spoke with Mr. Corwin, I advised him that the Defendant's failure to comply with the Order would compel my firm to seek an order of contempt against the Defendant, unless I could be assured that the monies past

due would be forthcoming and that the Defendant would comply with the Order. Mr. Corwin advised me that he could give no such assurances. He advanced no excuse, explanation or justification for the Defendant's failure to comply with an Order.

11. In view of the foregoing, I respectfully submit that it is clear that the Defendant had full notice and knowledge of the Order, that he received monies from General Cigar Corp. out of which funds he was directed by the Order to make the installment payments to the Plaintiff, that he has failed to make any such payments, that his failure is intentional and willful and that he is, therefore, in contempt of the Order of this Court. No prior application for this relief has been made.

#11 Deponent urges that this motion be made by order to show cause since any further delay will render more uncertain the possibility of enforcement of the order of this court dated Oct. 30, 1975

WHEREFORE, I respectfully request that the said MORTON L. ANNIS be held in contempt of this Court to be dealt with accordingly, that an order issue for his commitment pending compliance with the Order and that Plaintiff be

awarded its attorneys fees on this motion, as well as other appropriate relief.

S/
Victor A. Kovner

Sworn to before me this
3rd day of December, 1975.

S/
Notary Public

HELEN G.
Notary Public, State of New York
No. 24-0038451
Qualified in Kings County
Commission Expires March 30, 1976

EXHIBIT A is printed at
(A 330 - A 332)

EXHIBIT B is printed at
(A 344 - A 345)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD.

Plaintiff-Judgment Creditor,

Docket #71 Civ. 782

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

NORTON I. KATZ, being duly sworn, deposes and says:

1. This affidavit is submitted with reference to, but neither in opposition to, nor on the merits of the relief sought by, the plaintiff-judgment creditor's motion brought on by Order to Show Cause for an order to punish the defendant-judgment debtor for contempt. This affidavit is submitted solely as a matter of personal privilege to correct two gross misstatements affecting the law firm of which I am a member.

2. In Paragraph 6 of the moving affidavit, the affiant, Victor A. Kovner, Esq. states that he was advised that the monies accrued for defendant's benefit had been "paid over to Rich, Krinsly, Poses, Katz & Lillienstein, Esqs. attorneys for defendant". That advice, if given, was wholly false. The check in that amount was drawn to the order of

the judgment debtor, Morton L. Annis and forwarded by my firm directly to him. Annexed hereto is a photostatic copy of the said check. Also annexed hereto are copies of a letter received from Henry D. Whitehill, Vice-President-Secretary of General Cigar Corp. dated November 4, 1975 to my attention forwarding said check to my firm, and copy of a letter of November 6, 1975, written by me to Mr. Annis in Tampa, Florida, forwarding the same check to him.

3. Further, the affiant, Victor Kovner, Esq. states that Leslie Corwin, Esq., an associate of this firm advised him that this firm had received the sum of $26,041.67 from General Cigar Corp. and that this firm "had deducted from such sum certain legal fees due and owing to it by defendant and that the balance of said sum had been forwarded by his firm to defendant". That statement is untrue in that the check received from General Cigar Corp. in the amount of $26,041.67 was forwarded to Morton L. Annis in Tampa, Fla. by mail without any deduction therefrom by this firm. Further, there is annexed hereto the affidavit of Mr. Corwin affirming that he never made any such statement to Mr. Kovner.

4. Finally, this firm has no present authority to appear on behalf of judgment-debtor, Morton L. Annis, and we have, in fact, been unable to communicate with Mr. Annis for the past three weeks. He is represented by a firm of attorneys in Tampa, Florida, McFarlane, Ferguson, Allison

and Kelly, 512 Florida Avenue, Tampa, Fla., and it was James B. McDonough, Jr., of that firm who requested that we file a Notice of Appeal from this Court's order of October 30, 1975, which we did. The draft Notice of Appeal was prepared by Mr. McDonough's firm.

5. This affidavit is not directed toward any other portion of the affidavit submitted in support of the Order to Show Cause above referred to and should not be regarded as either an appearance or an admission or denial on the part of Morton L. Annis with respect to any of the allegations made.

Sworn to before me this
3rd day of December, 1975.

Rhoda Weinstein

RHODA WEINSTEIN
NOTARY PUBLIC, State of New York
No. 30-0[illegible]
Qualified in [illegible] County
Commission Expires [illegible] 19[illegible]

NORTON I. KATZ

DSA-16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD.

Plaintiff-Judgment Creditor DOCKET #71 CIV 782

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

LESLIE D. CORWIN, being duly sworn, deposes and says:

I have read Paragraph 7 of an affidavit of Victor A. Kovner, Esq., sworn to December 3, 1975 and served upon my firm at 3:25 P.M. today. That affidavit states that I advised Mr. Kovner "that (my) firm had received the sum of $26,041.67 from General Cigar Corp.; that (my) firm had deducted from such sum certain legal fees due and owing to it by Defendant and that the balance of said sum had been forwarded by (my) firm to Defendant."

I did not advise Mr. Kovner that my firm had received any sum from General Cigar Corp. nor that my firm had deducted from that sum any amount, nor that any balance of said sum had been forwarded by my firm to defendant. Instead

what I advised Mr. Kovner was that my firm had received a check from General Cigar Corp. payable to defendant Morton L. Annis and that my firm had forwarded the check to Mr. Annis.

None of the other statements attributed to me in Paragraph 7 of Mr. Kovner's affidavit were made by me.

Leslie D. Corwin

LESLIE D. CORWIN

Sworn to before me this

3rd day of December, 1975.

Rhoda Weinstein

RHODA WEINSTEIN
NOTARY PUBLIC, State of New York
No. 30-01[illegible]315
Qualified in [illegible] County
Commission Expires [illegible] 19 76

AUTHORIZED BY

General Cigar Co., INC.

NEW YORK, N. Y. 10016

1-30 / 210 9

R 46016

MANUFACTURERS HANOVER TRUST COMPANY
FIFTH AVE. & 43rd ST., NEW YORK

DATE	S	NO.	PAY	AMOUNT OF CHECK
NOV5 75	R	46,016	$26,041.67	$26,041.67

TO THE ORDER OF M.L.ANNIS

GENERAL CIGAR CO., INC.

Henry R. Kirkhill

H. Dunphy

⑆0210⑈0030⑆0009 8⑈0030⑈

PLEASE DETACH BEFORE DEPOSITING CHECK

OLD BALANCE	INVOICE DATE	VOUCHER NUMBER	GROSS	DISCOUNT	BALANCE
CONSULTANT FEES FROM 10 15 74	NOV 5 75	16,614	TO 10 15 75 26,041.67		26,041.67

GENERAL CIGAR CO. INC.

DSA-19

NOV 5 – 1975

General Cigar Co., Inc.

605 THIRD AVENUE, NEW YORK, N. Y. 10016

TEL.(212) 687-7575 TELEX: 126202 CABLE: GENCIGCO, NY

November 4, 1975

Mr. Norton I. Katz
Rich, Krinsly, Poses, Katz & Lillienstein
99 Park Avenue
New York, N. Y. 10017

Dear Mr. Katz:

As per advice from our attorneys I am enclosing a check made out to Morton L. Annis in the amount of $26,041.67. This represents consulting fees due Mr. Annis up to and including October 15, 1975.

Very truly yours,

Henry D. Whitehill

Henry D. Whitehill
Vice President-Secretary

Enclosure

cc: Mr. Morton L. Annis

DSA-20

November 6, 1975

Mr. Morton Annis
108 Martinique
Tampa, Fla. 33601

Re: Whitnauer Trading Co. v Annis
(General Cigar Co. Inc.)

Dear Mort:

We enclose herewith check #R 46016 of General Cigar Co. Inc. in the amount of $26,041.67. This check was forwarded to us under cover of a letter from Henry D. Whitehill of General Cigar Co. Inc., a copy of which is noted as having been forwarded to you.

We will await any further instructions you may wish to give us and we were glad to have been of service to you.

Faithfully yours,

NORTON I. KATZ

NIK:rw
Encl.

DSA-21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor,

against

MORTON L. ANNIS

Defendant-Judgment Debtor.

----------X

DOCKET NO. 71 Civ. 782 (RLC)

NOTICE OF CROSS-MOTION FOR STAY OF EXECUTION AND TO AMEND OR MODIFY AN ORDER

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of LESLIE D. CORWIN sworn to the 8th day of December, 1975 and upon all the pleadings and proceedings heretofore had herein, including the Order of this Court signed and entered on the 30th day of October 1975, the undersigned will cross move this Court at a stated term for the hearing of motions to be held at the United States Courthouse, Southern District of New York, Room 705, Foley Square, New York, New York, on the 9th day of December 1975 at 9:45 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for (1) an order staying execution of or any proceedings to enforce the order of this Court entered on October 30, 1975 pending dispostion of

defendant's appeal to the United States Court of Appeals, for the Second Circuit, on the ground that irreparable injury might result to defendant-judgment debtor; and (2) for an order to amend or modify this Court's Order entered October 30, 1975 which required the defendant-judgment debtor to pay by bank or certified check to the order of Lankenau, Kovner & Bickford as attorneys for judgment creditor in each and every month, on the first day thereof, for a five year period calculated from May 1, 1975: (a) principal, the sum of $3,000 against the principal amount of the judgment, $182,065.44, and (b) interest, monthly interest of $1,253.93, making the aggregate monthly installments $4,253.93 per month; and which further directs the defendant-judgment debtor to pay, by bank or certified check to the order of Lankenau, Kovner & Bickford, as attorneys for judgment creditor; (c) on or before October 31, 1975, the aforesaid installment payments for the months of May, June, July, August, September and October, 1975 aggregating $25,523.58, from the sum of $26,041.67 previously accrued by General Cigar Corp., for his benefit; and (d) on June 1, 1980, a final installment payment in the sum of $2,075.77; and (3) any further and different relief

as to this Court may seem just and proper.

Dated: New York, New York
December 8, 1975

Yours, etc.
RICH, KRINSLY, POSES, KATZ &
LILLIENSTEIN
Attorneys for Defendant-Judgment
Debtor
Office & P. O. Address
99 Park Avenue
New York, New York 10016

By: _____
Norton I. Katz
Member of the Firm

TO: Lankenau, Kovner & Bickford
Attorneys for Plaintiff-Judgment
Creditor
Office & P.O. Address
30 Rockefeller Plaza
New York, New York 10020

DSA-23

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor,

against

MORTON L. ANNIS

Defendant-Judgment Debtor.

----------X

DOCKET NO. 71 Civ. 782 (RLC)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LESLIE D. CORWIN being duly sworn deposes and says:

(1) I am an attorney associated with the law firm of RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, attorneys for the defendant-judgment debtor in these proceedings and am fully familiary with all the facts and circumstances relating thereto.

(2) This affidavit is submitted in opposition to the motion of the plaintiff-judgment creditor for an order adjudging the defendant-judgment debtor, MORTON L. ANNIS, in contempt of this Court and in support of the cross motion of the defendant-judgment debtor to (1) stay of execution of this Court's Order

entered October 30, 1975 pending disposition of defendant-judgment debtor's appeal to the United States Court of Appeals, Second Circuit; and (2) for an order modifying or amending this Court's order of October 30, 1975.

It appears beyond question that a District Court has the power to grant a stay of its own order pending the determination of an appeal therefrom. Hovey v. McDonald, 109 U.S. 150, 161, 3 S.Ct. 136 (1883); Ivor B. Clark Co. v. Hogan, 296 Fed. Sup. 407, 409 (S.D.N.Y. 1969); Sirloin Room, Inv. v American Employer's Ins. Co., 360 F.2d 160, 161 (5th Cir. 1966); In re Federal Facilities Realty Trust, 227 F.2d 651, 654 (7th Cir. 1955); 7 Moore, Federal Practice, ¶ 62.06 at 1371 (2d ed. 1966); 3 Barron & Holtzoff, Federal Practice & Procedure, § 1374 at 467; see Beaver Cloth Cutting Machines, Inc. v. H. Maimin Co., 37 F.R.D. 47 (S.D.N.Y. 1964).

(3) The Court herein is faced with Federal Rule of Civil Procedure 62 (D) and General Rule 33 of the United States District Court, Southern District of New York.

The Court has the inherent power in extraordinary circumstances to provide for the form and amount of security for a stay pending an appeal, based on the conditions it finds

to exist in a particular case. Trans-World Airlines, Inc. v Hughes, 314 Fed. Sup. 94, 96 (S.D.N.Y., 1970); see 9 Moore Federal Practice § 208.06 (1) at p. 1416 (2d ed. 1969).

It is the contention of the defendant-judgment debtor on these motions that extraordinary circumstances exist and good cause can be shown why he is unable to post the supersedeas bond on his appeal to the United States Court of Appeals, Second Circuit. To require him to post the bond pursuant to the requirements of Rule 33, would inflict a great hardship on Mr. Annis. At the present, Mr. Annis is semi-retired and for over a year has suffered from cancer and has been in and out of hospitals. He receives cobalt treatment and has incurred large hospital bills and related expenses. Mr. Annis is, at the present time, in dire financial straits and is in no position to meet the stringent monetary requirements for sufficient security for the payment of the judgment currently entered against him pursuant to General Rule 33.

(4) The defendant-judgment debtor on his cross-motion, is seeking to modify or amend the order of the Court entered on October 30, 1975 on the following grounds:

a. There was not sufficient evidence before this Court to warrant the granting of its order;

b. The installment payment order of the Court is defective because it directs the defendant judgment debtor to pay money to the plaintiff judgment creditor which is not conditioned on the receipt of income;

c. The order of the Court and the original opinion of the Court filed October 6, 1975 clearly show that the installment payment order issued pursuant to N. Y. CPLR § 5226 was not made subject to the 25% limitation of the Federal Garnishment Clause contained in 15 U.S.C. § § 1671 thru 1677 (Consumer Credit Protection Act);

d. The Court erroneously ordered the defendant judgment debtor to make installment payments beginning from the date of the original motion (May 1, 1975) rather than from the date of the entry of the order (October 30, 1975).

It should be noted for the record that the four grounds enumerated above are to be raised as issues on defendant judgment debtor's appeal to the Court of Appeals for the Second Circuit. Although defendant judgment debtor does not wish, at

this time, to argue its appeal, since he is seeking modification and amendment of this Court's order, each of the above issues will be dealt with herein in the hopes of receiving some relief from this Court.

(5) In its opinion of October 6, 1975 the Court, in no uncertain terms, held that the "plaintiff will not be permitted to profit from wrongdoing...", (see page 7 of opinion) yet, in its order entered October 30, 1975 the Court allows the plaintiff-judgment creditor to achieve just such a result.

The order directs the defendant judgment debtor "to pay on or before October 31, 1975, the aforesaid installment payments for the months of May, June, July, August, September and October, 1975, or an aggregare of $25,523.58 from the sum of $26,041.67, previously accrued by General Cigar, for his benefit, which sum is to be received by him from General Cigar Corporation". Nowhere in the opinion of this Court was such a provision provided requiring the defendant-judgment-debtor to make back payments. This has imposed an undue hardship for Mr. Annis and is the chief reason why at this point in time he finds himself faced with an order of this Court ordering him to show cause

why he should not be held in contempt of this Court.

It is respectfully pointed out to the Court that Mr. Annis was deprived of the use of the General Cigar funds (the sum of $26,041.67) for well over a year. This was a direct result of the improper restraining notice held by this Court to have been issued by plaintiff to General Cigar. (see page 9 of Opinion).

(6) Kaufman v. Kaufman, 29 A.D. 2d 922, 289 NYS 2d 23 (1st Dept. 1968) (previously cited by your deponent in his affidavit of October 27, 1975 in support of defendant judgment debtor's proposed order) clearly stands for the proposition that installment payment orders should run from the time of entry of the Court's order and not from the date that the original motion is brought on. To provide otherwise would, as a matter of law, cause a severe hardship to the judgment debtor, unless the judgment debtor himself has caused a delay in entry of the order. As the court states in Kaufman.

> *** "Furthermore, we find that the delay in the entry of the order was not brought about by defendant, so that requiring payments to begin as of the date of institution of the proceeding will work a hardship on the defendant and impose a burden he cannot meet." (289 N.Y. Sup. 2d at Page 24 through 25.)

(7) Federal rules prohibit garnishment of more than 25% of an individuals' earnings. In dealing with any installment payment order, it is respectfully submitted that this Court was bound by the 25% federal garnishment limitation on disposable earnings imposed under the Consumer Credit Protection Act (hereinafter "CCPA") 15 USC § 1673(a).

According to the United States District Court in Hodson v. Cleveland Municipal Court, 326 Fed. Sup. 419 (U.S.D.C., N.D. of Ohio 1971):

> "Congress expressly provides that State court orders and process issued in violation of garnishment restrictions of section 1673(a) are 'both unauthorized and forbidden.' It is determined and declared that interlocked section 1673(a) and section 1673(c) federally forbid the making, execution, or enforcement of any State court 'order or process' that violates the restrictions on garnishment contained in section 1673(c) or any regulation of the Secretary promulgated as 29 C.F.R. §870.10. Likewise, the effect of any State garnishment law that underlies such offending State court 'order or process' is federally preempted." 326 Fed. Sup. at 431.

(8) The Court in its opinion of October 6, 1975 held that "the installment payment order is not limited by the Federal Garnishment Law contained in 15 USC §§ 1671 thru 1677". (See page 20 of Opinion). The Court reasoned in its opinion that an installment payment order is not a "garnishment" within

the meaning of CCPA principally because it runs directly to the judgment debtor rather than to a third person.

Consideration of the backround and purpose of the CCPA, however, militates against the Court's conclusion and indicates that Congress did intend to place an installment payment order, similar to the one issued herein, under the protection of the Federal Garnishment Laws. First of all, an installment payment order issued pursuant to CPLR § 5226 easily fits within the federal statutes own definition of "garnishment". USC § 1672(c) defines "garnishment" as any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." Nowhere, does the definition indicate that a third party must do the withholding, and would seem to cover an installment payment order where the debtor, himself, is required to withhold sums from his own earnings to contribute to his debt. Also, the use of the term, "earnings", rather than the "wages" or "salary" in the definition can be taken to indicate that profits of a self-employed individual would be protected by the Federal Garnishment Laws.

The argument that "garnishment" under the federal statute is not limited to processes involving a third party is supported by the U.S. District Court's decision in

In re Cedor, 337 Fed. Sup. 1103 (N.D. California, 1972), aff'd. 470 Fed. 2d 996 (Ninth Circuit 1972), cert. denied, 411 US 973 (1973). That case held that an order to a bankrupt to turn over an income tax refund to the trustee in bankruptcy was a "garnishment" since the refund was traceable to "earnings".

In addition, the congressional purpose in enacting the garnishment laws dictates that installment payments be included. §1671 sets forth the concerns of Congress in passing the law. §§ 1671 (a) (1) and (3) show concern over "predatory extensions of credit" and uniformity of the bankruptcy laws.

(9) The most recent case dealing with the Federal Garnishment Laws is Hodgson v Christopher, 365 F. Supp. 583 (D. N. Dakota, 1973.) This case dealt with a complaint brought on by the Secretary of Labor against the Sheriff of Grand Forks County, North Dakota against two practices employed in said county pursuant to the North Dakota Century Code which were alleged to be violative of the CCPA. In enjoining the Sheriff from enforcing the two practices in question, in that they were violative of the CCPA, the Court stated as follows:

> "The term garnishment is not restricted but includes any procedure by which earnings of an individual are withheld." 365 Fed. Sup. at 586.

The Court then went on to state:

> "It would be a misconstruction of the scope and intent of the act were the court to hold otherwise. The Defendants' argument is specious for a very basic reason. It would be comparatively simple for a sheriff to ascertain when an employer issues his payroll checks, or puts cash in pay envelopes. Once the sheriff has discovered the time of payroll issuance, he could avoid the problems and restrictions of the CCPA by simply waiting and levying on the debtor's wages after issuance because then their nature, according to the Defendants, changes to personal property.
>
> An Act of Congress must be construed in the light of common sense consistent with its express purpose and intent. The interpretation urged by the Defendants would circumvent the Act in Grand Forks County if the result prohibited under the garnishment statutes could be achieved by simply proceeding under the execution statutes." 365 Fed. Sup at 587.

(10) In the same vein, your deponent is hard pressed to believe that Congress in enacting the CCPA acted to protect only those with employers and not the self-employed. The law should not be construed to protect a wage earner but not the proprietor of a grocery store or a photography studio.

(11) In its opinion of October 6, 1975, the Court found support for its interpretation of the meaning of "garnishment" in the exclusion of installment payment order from that term as used in Personal Property Law § 46. The Court

recognized that the state law definition was not dispositive but felt that it "may be instructive in interpreting the Federal Law." (See page 20 of Opinion). However, the § 46 definition is a limited one with no general effect on state law and certainly none on federal law. §46 provides in pertinent part:

> "In this article, unless the context or subject matter otherwise requires***
> 8. "Garnishment" shall not include an order for installment payments to a judgment-creditor.

Consequently the above definition is for use only in Personal Property Law Article 3-A on assignment of earnings, and then only when the context or subject matter does not otherwise require. Said section was not intended to have any effect whatsoever outside its own terms and should not be instructive in interpreting other laws.

(12) It has been held that an installment payment order under CPA § 793, the predessor section to CPLR § 5226, is defective if it orders the judgment-debtor to pay installments absolutely rather than ordering him to pay out of income actually received. F. E. Compton & Co. v. Williams, 290 NYS 984 (4th Dept., 1936); Long Island Trust Company v. Ross, 239 NY sub. 2d 930 (Supreme Court, Nassau County, 1963). For this reason alone, the Court's order of October 30, 1975 is defective and should

be amended or modified. In paragraph 3, page 2, the order provides that "the defendant-judgment debtor is directed to pay, out of all monies received, to be received or for which he is entitled to receive..." Since the order directs payment out of monies entitled to be received, it is defective. If the defendant-judgment debtor received no income because, for example, General Cigar Corporation went bankrupt or breached its contract, he would be required to pay his installments anyway since he was "entitled" to receive the money even though he never got it.

In F. E. Compton & Co. supra the installment payment order was modified to provide that payment of installments be made only out of income received. The Court stated:

> "The payments called for by section 793 of the Civil Practice Act are to be made from the income of the judgment debtor. If he has no income, there is no authority in this section to direct him to pay any specified amount to his creditor. The reason for this is clear. If he refuses, or without good reason neglects to make the payments as ordered, he is liable to be punished for contempt of court. If directed to pay the installments out of his income, and he has no income during certain periods, by failing to make his payments on such occasions he does not disobey the mandate of the court, and cannot be punished for contempt." 290 N.Y. sub at 989 to 990.

This language was cited and the holding followed in Long Island Trust Company v. Ross, supra.

(13) Furthermore, the Court's order is defective because it directs the defendant-judgment debtor to make payments of $25,000 per year over a five (5) year period and bases said order "on an income of $60,000 per year, including the $35,000 compensation from General Cigar Corporation and the $35,000 in consulting payments from Master Packaging which will be deemed to be received by Annis for purposes of this motion." (See page 18 of Opinion)

The evidence before the court on the hearing of the motion of May 1, 1975 was totally insufficient to support such a finding. As an example, I have annexed hereto as Exhibit "A" a copy of the agreement of July 2, 1973 between Morton L. Annis and Master Packaging, Inc. (hereinafter referred to as the "Master Packaging Agreement"). As is evident, the Master Packaging Agreement runs only to July 2, 1978 after which time Mr. Annis will not be entitled to receive anything, let alone the $35,00 he is now entitled to. Consequently, it was an error for this Court to deem Mr. Annis to be receiving an income of $60,000 per year for a five (5) year period and to base its order of October 30, 1975 on such an assumption.

(14) Plaintiff Judgment Creditor by bringing on it's order to show cause is seeking herein to have Mr. Annis adjudged in contempt of Court. In an attempt to avoid punishment, judgment debtors will often seek a modification of the installment payment in the course of the contempt proceeding. Defendant-judgment debtor has taken such a stance on these motions. The courts generally will permit this type of collateral attack on the original order and refuse to punish the debtor if he can establish his inability to make the payments. See Weinstein-Korn-Miller, New York Civil Practice § 5226.23, at 52-416-417 (1974) and the cases cited thereunder.

Installment payment orders issued by this Court are subject to modification from time to time upon motion of either party and a showing of changed circumstances. See McDonnell v. Birrell, 321 F. 2d 946, 947 (2d Cir. 1963).

(15) The defendant-judgment debtor strenously opposes plaintiff judgment creditor's attempt to hold him in contempt.

First of all, contempt should not be determined by default or on an affidavit by the attorney for the plaintiff. Matter of Caruso v. Schilingo, 23 A.D. 2d 627, 257 NYS 2d 719 (4th Dept., 1965); UNI-SERV CORPORATION v. LINKER, 311 NYS 2d 726, 730 (NY Civil Ct, 1970)

The fact that the judgment debtor has failed to comply with the order does not of itself render the defendant guilty of contumacious conduct calculated to defeat, impair, impede and prejudice the rights and remedies of the plaintiff. Sure Fire Fuel Corp. v. Martinez, 348 NYS 2d 502 (Civil Ct, NYCo, 1973). "If a debtor is directed to pay installments out of his income and he has no income during certain periods he does not disobey the mandate by failing to make payments on such occasions and cannot be punished for contempt. [At a subsequent hearing] the debtor, of course, carries the burden of establishing that he had no income out of which to pay the installments". In re Stupplebeen, 171 Misc. 987, 989, 14 N.Y.S.2d 756,758 (Columbia County Ct, 1938).

As the Court stated in Sure Fire Fuel Corp. v. Martinez, supra:

> "In matters of this type when it appears that there may be financial inability better practice would dictate that before an order of contempt issue the judgment debtor be brought before the court and examined by the judge to determine his financial status and the possibility of payments in the amount ordered" (Matter of Caruso v Schilingo, 23 A.D.2d 627, 628, 257 N.Y.S.2d 719, 721, 1965). To the same effect, see Uni-Serv Corporation v. Linker, supra; Diamond & Frazer Iron Works v. DiTullio, 157 Misc. 800, 801, 284, N.Y.S. 658 (1935).

(16) Accordingly, should his motion for modification or amendment be denied by this Court, then Mr. Annis seeks a continuance of plaintiff judgment creditor's motion to hold him in contempt on the ground that he should be granted an opportunity to be examined by the Court or a magistrate of this Court (See: SHANLEY v SHANLEY, 87 NYS 2d 617, (2d Dept. 1949), to determine his financial status and his ability to make the installment payments previously ordered. This is his right as a matter of law. F. E. Compton v. Williams, supra; Matter of Caruso v. Schilingo, supra; Uni-Serv Corp. v. Linker, supra; Sure Fire Fuel Corp. v. Martinez, supra.

As the Court stated in the Sure Fire Fuel Corp. case:

> "In criminal contempt proceedings the United States Supreme Court has held that procedural due process "requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation" (In re Green, 369 U.S. 689, 691 692, 82 S.Ct. 1114, 1116, 8 L.Ed.2d 198, 201 (1962); In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 508, 92 L.Ed. 682, 695 (1947). Similarly, in civil proceedings the individual's fundamental right to procedural due process should not be violated, especially in view of the severe penalties which may be imposed. Here, certainly, "the right to notice and an opportunity to be heard 'must be granted

at a meaningful time and in a meaningful manner'" (Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1973, 1994, 32 L.Ed.2d 556, 570 (1972)." 348 NYS 2d at 505-506.

WHEREFORE, I respectfully request that an order staying execution of this Court's order of October 30, 1975 be modified or amended for the reasons stated above, and that plaintiff-judgment creditor's motion to hold Morton L. Annis in contempt of this Court be denied in its entirety.

LESLIE D. CORWIN

Sworn to before me this

8th day of December, 1975

Notary Public

[illegible]-7517755
[illegible]fied in Westchester County
Commission Expires March 30, 1976

Exhibit A is printed at
(A 346 - A 349)

DSA-40

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN

Attorneys for

Office and Post Office Address

99 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10016

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RICH, KRINSLY, POSES, KATZ & LILLIENSTE..

Attorneys for

Office and Post Office Address

99 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10016

To

Attorney(s) for

Index No. 71 CIV 782 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor,

-against-

MORTON L. ANNIS,

Defendant-Judgment Debtor

12/9/75
Motion denied in all respects.
So ordered
Robert L. Carter
USDJ

U.S. DISTRICT COURT FILED DEC 9 1975 S.D. OF N.Y.

CROSS MOTION FOR A STAY AND ORDER TO MODIFY OR AMEND, and AFFIDAVIT

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN

Attorneys for Defendant, Judgment-Debtor

Office and Post Office Address, Telephone

99 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10016

867-7200

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Copy Received
12/4/75 10:00 AM
Conferences Kaplan + Dickford

MICROFILM
DEC 9 1975

DSA-41

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff,

-against-

MORTON L. ANNIS,

Defendant.

----------x

REPLY AFFIDAVIT IN SUPPORT OF MOTION TO ADJUDGE DEFEND. IN CONTEMPT

71 Civ. 782 Judge R. Carter

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

VICTOR A. KOVNER, being duly sworn, deposes and says:

1. This affidavit is submitted in response to the affidavits of Norton I. Katz and Leslie D. Corwin, both sworn to December 3, 1975, and in support of the motion to adjudge defenda in contempt.

2. By way of clarification of my moving affidavit, I wish to reiterate that I was told by Mr. Laino that, unlike the future monthly payments which were to be forwarded to Mr. Annis individually, the check of $26,041.67 was sent to the attorneys for the defendant. I did not state (nor did I know until I read the reply affidavit of Mr. Katz) the identity of the payee on said check. It was my understanding from conversing with Mr. Corwin that certain fees had been paid to the attorneys for the defendant at that time. Apparently my understanding was not correct and I believe the correspondence annexed to Mr. Corwin's affidavit makes clear that the entire check was forwarded directly to Mr. Annis.

3. There can be no question that Mr. Annis was fully aware of his obligations and, indeed, received the full amount of $26,041.67 since he was the sole payee on the check. This affidavit merely confirms the wilfulness of the defendant's contempt of an order of this Court.

4. Furthermore, no weight should be given to Mr. Katz's statement that his firm has no authority to appear on behalf of Morton L. Annis. Not only did Mr. Katz's firm fully litigate the motion for an installment order, but indeed, after the order was entered and the funds collected and defendant's wilful disregard of the order evident, Mr. Katz's firm served a Notice of Appeal.

5. Significantly, Rule 14 of the Civil Rules of this District provide:

> ". . . Where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the papers upon which it is based may be served upon his attorney. . "

WHEREFORE, your deponent respectfully urges that the motion to adjudge defendant in contempt be granted in all respect

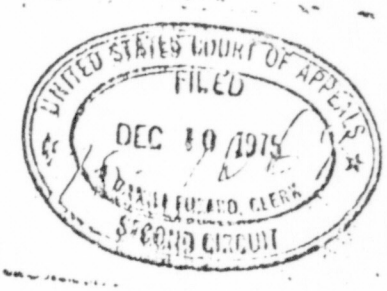
VICTOR A. KOVNER

Sworn to before me this
8th day of December, 1975

HELEN G. HOPKINS
Notary Public, State of New York
No. 24-5[illegible]
Qualified in Kings County
Commission Expires March 30, 1976

DSA-43

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Respondent,

- against -

MORTON L. ANNIS,

Defendant-Appellant.

71 CIVIL ACTION 782

MOTION FOR STAY PENDING APPEAL

75 7669

Defendant-Appellant moves the Court to stay enforcement of a certain order of the United States District Court for the Southern District of New York, made and entered herein October 30, 1975, directing the defendant-appellant to pay "by bank or certified check to the order of Lankenau, Kovner & Bickford as attorneys for judgment creditor in each and every month, on the first day thereof, for a five year period calculated from May 1, 1975: (a) principal, the sum of $3,000 against the principal amount of the judgment, $182,065.44, and (b) interest, monthly interest of $1,253.93, making the aggregate monthly installments $4,253.93 per month; and which further directs the defendant-judgment debtor to pay, by bank or certified check to the order of Lankenau, Kovner & Bickford, as attorneys for judgment creditor: (c) on or before

The hearing on the within motion has been set for
at 10:30 A.M. in Room 1705
U. S. Courthouse, Foley Square, New York, New York 10007
Vincent A. Lapinski
Clerk

October 31, 1975, the aforesaid installment payments for the months of May, June, July, August, September and October, 1975 aggregating $25,523.58, from the sum of $26,041.67 previously accrued by General Cigar Corp., for his benefit; and (d) on June 1, 1980, a final installment payment in the sum of $2,075.77."

pending the disposition of the defendant-appellant's appeal to this Court from the said order, and for that purpose to fix the amount of the bond required to be filed by the defendant-appellant.

Dated: New York, N.Y.
December 9,
1975.

RICH, KRINSLY, POSES, KATZ &
LILLIENSTEIN, ESQS.,
Attorneys for Defendant-Appellant,
Office & P.O. Address:
99 Park Avenue,
New York, New York 10016
(212) 867-7200)

BY: _____
NORTON I. KATZ
Member of the Firm.

TO: LANKENAU, KOVNER & BICKFORD, ESQS.,
Attorneys for Plaintiff-Respondent,
30 Rockefeller Plaza,
New York, New York 10020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Respondent

- against -

MORTON L. ANNIS,

Defendant-Appellant.

----------X

71 CIV 782

AFFIDAVIT

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

LESLIE D. CORWIN, being duly sworn, deposes and says:

1. I am an attorney associated with the law firm of RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, attorneys for the defendant-appellant herein, and I am fully familiar with all the facts and proceedings heretofore had herein.

2. The order of the Court below which is the subject of this motion is annexed hereto. Notice of Appeal was timely served and filed. Copy thereof is likewise annexed.

3. Heretofore and on December 9, 1975, a motion for a stay of the order appealed from was submitted to the Hon. Robert L. Carter, District Court. Said motion was argued orally and the Court denied the motion from the Bench and stated that its order denying the said motion would be then and there entered upon the motion papers and become effective as an

order of the District Court.

4. Submitted also at the same time as the said motion for a stay, was a motion by the defendant-appellant to amend or modify the order appealed from. Said motion was likewise denied by the Court from the Bench, the Court again stating that such denial would be evidenced by endorsement on the motion papers and become effective as an order of the Court.

5. The Court below stated no grounds for denial of said motions other than to state that the papers submitted by the defendant-appellant did not put in issue the defendant-appellant's non-compliance with the order appealed from, and that the procedure of denial from the bench without formal order, other than the written endorsement on the motion papers, was the Court's method of disposing of motions which it felt to be patently without merit. No stenographic transcript of the proceedings on the return of the motion was made.

6. My firm has, as attorneys for defendant-appellant, been served by the attorneys for the plaintiff-respondent, with a proposed order, noticed for settlement on December 11, 1975 at noon, adjudging the defendant-appellant to be guilty of contempt of the Court and directing payment of a fine, attorneys' fees and further directing that a United States Marshal, upon receipt of the certified copy of the order, be directed to take the defendant-appellant into custody

and commit him for confinement in a Federal House of Detention until arrears allegedly due under the order appealed from and in amounts which may additionally become due, together with the fine and costs, are paid. This application likewise seeks a stay of that order.

7. The grounds why the within order to stay execution on the order appealed from should be granted are set forth at length in the attached Notice of Cross Motion and supporting papers, which were submitted to the District Court. (Exhibit "1") In summary, those grounds are:

(a) The authority found in Rule 8 (a), (b) of the Federal Rules of Appellate Procedure;

(b) That extraordinary circumstances exist in that the defendant-appellant, who suffers from cancer, is threatened with immediate imprisonment and confinement in the Federal House of Detention.

(c) That the order appealed from was granted without the conduct of any hearing, and without sufficient evidence in support thereof;

(d) The order appealed from directs the defendant-appellant to pay money to the plaintiff-respondent which is not conditioned on the receipt of income;

(e) The Court failed to give effect to the limitation contained in 15 USC §1671 through §1677 (Consumer Credit Protection Act) limiting any state garnishment to

25% of the debtor's earnings;

(f) The order below erroneously directed the defendant-appellant to make installment payments retroactively commencing from May 1, 1975 rather than from the date of entry of the order, October 30, 1975. (See: KAUFMAN v KAUFMAN, 29 A.D. 2d 922 (1st Dept., 1968).

(g) The Court below, in making the order appealed from, erroneously disregarded the law of the case as it itself had established that law, in an opinion dated October 6, 1975, copy of which is annexed hereto, as Exhibit "2". That is, the District Court, which had originally enforced a restraining notice issued by the plaintiff-respondent, reversed itself and found that the restraining notice was invalid; consequently, it denied the plaintiff-respondent's application for issuance of an execution against the funds accumulated under the invalid restraining notice, holding that the "plaintiff will not be permitted to profit from wrong doing....." (See page 7 of opinion, Exhibit "2".) Yet, in the order appealed from, the Court permitted the plaintiff-respondent to achieve just such a result by directing the turn-over of the very same fund accumulated by the invalid restraining notice, as to which the Court itself had denied the issuance of execution on the ground recited above.

(h) Because it failed to hold a hearing on the order appealed from, the Court below made certain assumptions as to the defendant-appellant's earnings. One such assumption was that the defendant-appellant had "an income

of $60,000.00 per year, including the $35,000.00 compensation from General Cigar Corporation and the $35,000.00 in consulting payments from Master Packaging Inc. which will be deemed to be received by Defendant-appellant for purposes of this motion." (See page 18, Exhibit "2"). Annexed to the motion papers submitted to the District Court and made a part of this application (Exhibit "1") is a copy of the defendant-appellant's agreement with Master Packaging, Inc., which indicates that that agreement runs only to July 2, 1978, while the Court made its order effective for a five (5) year period extending beyond the expiration of the Master Packaging agreement.

8. Further, with respect to the order adjudging the defendant-appellant to be in contempt, which is likewise sought to be stayed by this application, the Court below was in error in failing to hold any hearing with respect to the debtor's present ability to fulfill the installment payment order. McDONNELL v BIRRELL, 321 Fed. 2d 946, 947 (2d Circuit, 1963); MATTER OF CARUSO v SCHILINGO, 23 Ap. Div. 2d 627, 257 N.Y. Sup. 2d 719 (4th Dept. 1965); SURE FIRE FUEL CORP. v MARTINEZ, 348 N.Y. Sup. 2d 502, (Civil Court, N.Y.County, 1973.)

9. For the foregoing reasons, it is respectfully submitted that the within motion should be granted and that:

a) All proceedings under the order appealed from should be stayed / pending the hearing and determination of

the within appeal from the said order;

b) All proceedings to punish the defendant-appellant for contempt for failure to comply with said order should be stayed;

c) This Court should fix a bond in an appropriate amount as a supersedeas, and in such amount as not to deprive the defendant-appellant indirectly of the right to a hearing and determination of the within appeal.

d) Because of the imminence of the settlement on December 11, 1975, of an order for the imprisonment of the defendant-appellant, it is respectfully submitted that this motion be heard on one days notice and determined as expeditiously as possible, either by a panel of this Court or by a single judge. Copy of the proposed order with Notice of Settlement is annexed hereto, as Exhibit "3".

LESLIE D. CORWIN

Sworn to before me this
9th day of December, 1975

RHODA WEINSTEIN
NOTARY PUBLIC, State of New York
No. 30-01WE4600615
Qualified in Nassau County
Commission Expires March 30, 19 77

DSA-51

COUNTER-ORDER is printed at
(A 330 - A 332)

NOTICE OF APPEAL is printed at
(A 344 - A 345)

EXHIBIT 1 is printed at
(DSA 21 DSA 40)

DSA-53

EXHIBIT 2 is printed at
(A 307 - A 329)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD., Plaintiff, -against- MORTON L. ANNIS, Defendant.	71 Civ. 782 (RLC) ORDER ADJUDGING DEFENDANT IN CONTEMPT

This matter came on for hearing on motion of Lankenau Kovner & Bickford, attorneys for plaintiff, for an order punishing MORTON L. ANNIS, defendant, for a contempt of an order of this court, and the court having considered the affidavit of Victor A. Kovner in support of such motion, affidavits of Norton I. Katz and Leslie D. Corwin, attorneys for defendant, the affidavit of Victor A. Kovner in reply, and having heard argument by both parties, and being fully advised, the court makes the following

FINDINGS OF FACT

1. Before the return date of this motion, defendant had notice of the order of this Court entered October 31, 1975 directing him to make certain installment payments (the "Order").

2. Defendant received the sum of $26,041.67 from which he was to make the past-due installment payments, pursuant to the Order.

3. Defendant has willfully and intentionally refused to comply with the Order by failing to make the installment payments due on October 31, November 1 and December 1, 1975, in the aggregate amount of $34,031.34.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that said MORTON L. ANNIS is guilty of contempt of this Court in refusing to make the installment payments heretofor required, pursuant to the Order of this Court entered October 31, 1975.

It is further ORDERED that the said MORTON L. ANNIS pay a fine in the sum of $ and the costs of this proceeding, including attorneys' fees, such fine and costs to be payable to Lankenau Kovner & Bickford, Attorneys for plaintiff.

It is further ORDERED that said MORTON L. ANNIS be confined to a federal house of detention until the aforesaid $34,031.34 (and any additional amounts which may become due, pursuant to the aforesaid order of this Court), together with the fine of $ and costs are paid; and that a United States marshal, upon receipt of a certified copy of this order, be directed to take said

MORTON L. ANNIS in custody and commit him as aforesaid.

Dated: December , 1975

U.S.D.J.

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY, LTD., Plaintiff, Judgment-Creditor Appellee,	71 CIV 782
- against -	SUPPLEMENTAL AFFIDAVIT
MORTON L. ANNIS, Defendant, Judgment Debtor Appellant.	75-7669

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

LESLIE D. CORWIN, being duly sworn, deposes and says:

1. I make this affidavit to supplement the affidavit sworn to by me December 9, 1975, and heretofore submitted to this Court. This affidavit reflects facts occurring after the making of the latter affidavit.

2. Yesterday, December 9, 1975, I served upon the attorneys for the Plaintiff, Judgment-Creditor-Appellee, WEITNAUER TRADING COMPANY, LTD., at 3:30 P.M., the moving papers on the within motion for a stay of the order of the District Court (Carter, J.D.C.) dated October 30, 1975, modifying the District Court's prior order and directing the Defendant,

Judgment-Debtor-Appellant to make installment payments retroactively to the date of the original application for the order modified, and the order of the same District Court granting the motion of the Plaintiff, Judgment Creditor-Appellee to hold the Defendant, Judgment-Debtor-Appellant, MORTON L. ANNIS, in contempt of the said installment payment order, and further ordering his incarceration.

Upon submission of the papers to the Deputy Clerk of this Court, I was instructed to convey to Judge Carter this Court's request that he grant an interim stay of both orders for seven (7) days in order to permit the hearing of this application on a regular motion day of this Court.

Thereupon, at 5:00 P.M., by appointment, I appeared before Judge Carter and conveyed this Court's request to him. He stated to me that he would not grant the requested seven (7) day stay.

3. Thereupon, I returned to this Court, and was instructed to appea. this morning with four fully conformed copies of my moving papers for submission to the Court at 10:30 A.M. on December 11, 1975.

4. The necessity for urgent hearing of this matter is that an order directing the United States Marshal to

incarcerate the Defendant, Judgment Debtor-Appellant, was noticed for settlement before Judge Carter at 12:00 noon tomorrow, December 11, 1975 (See Exhibit "3" annexed to affidavit of Leslie D. Corwin, sworn to December 9, 1975) and Judge Carter indicated his intention to sign the submitted order when I appeared before him yesterday evening.

Leslie D. Corwin

LESLIE D. CORWIN

Sworn to before me this
10th day of December, 1975.

Rhoda Weinstein

RHODA WEINSTEIN
NOTARY PUBLIC, State of New York
No. 30-01WE4600515
Qualified in Nassau County
Commission Expires March 30, 19 76

DSA-60

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Respondent,

-against-

MORTON L. ANNIS,

Defendant-Appellant.

AFFIDAVIT IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

VICTOR A. KOVNER, being duly sworn, deposes and says:

1. I am a member of the firm of Lankenau Kovner & Bickford, trial counsel for plaintiff in this proceeding and am fully familiar with the facts and circumstances relating to the pending motion for a stay. I submit this affidavit in opposition to defendant's motion for a stay pending appeal of an order of the District Court entered October 31,1975, which, inter alia, directs defendant to make certain installment payments in connection with an outstanding judgment. No supersedeas bond has been given and defendant seeks to be relieved of his obligations under Rule 62 (d) FRCP and Rule 33 of the General Rules of the District Court.

Preliminary Statement

2. Ostensibly, plaintiff seeks a stay from the October 31, 1975, order of the District Court directing installment payments by the defendant-judgment debtor. Defendant already has defaulted on the first three ordered payments and the next installment is not payable until January 1, 1976. Hence, there is no

need, let alone immediate and irreparable harm, for the stay now sought. To the extent plaintiff is seeking a stay from an order holding him in contempt for prior defaults, the request is premature - no order of contempt has been signed (one has been noticed for settlement for December 11, 1975) and no application for a stay of a contempt order has been made by defendant to the District Court as is required by Rule 8 (a) of the Federal Rules of Appellate Procedure.

Prior Proceedings

3. This action was commenced on March 1, 1971, based upon the defendant's execution of a guarantee dated September 30, 1969, which was subsequently amended and increased in January, 1970. After a two-day trial in October, 1973, a decision in favor of plaintiff was filed on June 19, 1974 (Exhibit 1 annexed hereto), and a judgment in favor of the plaintiff against defendant was duly entered on September 19, 1974, in the amount of $182,065.44 together with interest.

4. On May 28, 1975 this Court unanimously affirmed the judgment of the District Court (Exhibit 2 annexed hereto). No part of the judgment has been paid.

5. On May 1, 1975, the District Court heard defendant's motion to vacate a restraining notice served upon the General Cigar Corp. (which had and has a contractual obligation to make certain monthly payments to the defendant-judgment debtor), and plaintiff's cross-motion for an installment payment order. Voluminous papers and exhibits were submitted to the Court and Judge Carter allowed counsel for both parties additional time in which to file supple-

mental papers in connection with said motions and additional affidavits were filed.

6. On October 1, 1975, the District Court granted defendant's motion to vacate the prior restraining notice and in addition granted plaintiff's cross motion for an installment payment order. A copy of said decision is annexed hereto as Exhibit 3 . Thereafter, with ten (10) days notice of settlement, both sides submitted proposed orders and supporting affidavits.

7. On October 31, 1975, an order (the stay of which is sought upon the pending motion) was entered, a copy of which is annexed hereto as Exhibit 4 . The order (hereinafter referred to as the "Installment Payment Order") directed, inter alia, that the defendant make installment payments of $4,253.93 per month so as to provide for the complete payment of the judgment, together with interest, over a 5-year period commencing May 1, 1975, the date the motion for an installment payment order was returnable before the Court.

Defendant's Receipt of the Funds held by General Cigar Corp. and his wilful Contempt of the Order of the Court.

8. As plaintiff's attorneys' papers establish, defendant received $26,041.67 on or about November 6 from General Cigar Corp. Notwithstanding the fact that the Installment Payment Order directed that from said income defendant pay over to plaintiff's attorneys the sum of $25,523.58, no payment of any kind has been made to date. The attorneys for General Cigar Corp. have advised me that defendant's monthly consulting fee for the period commencing October 15, 1975 in the amount of $2,083 per month is paid directly

to defendant at his home. None of the monthly payments directed by the Installment Payment Order has been made, notwithstanding defendant's monthly receipt of income ($2,083 a month from General Cigar Corp., and presumably of $2,900 per month from Master Packaging Co. as well).

9. On November 21, 1975, defendant served its notice of appeal from the Installment Payment Order. At that time, no request for a stay was sought nor was any application made to modify such order.

The Institution of Contempt Proceedings and the Cross-Motion for a Stay of the Installment Payment Order

10. After several days telephone notice to defendant's attorneys, plaintiff instituted a motion to adjudge defendant in contempt (hereinafter referred to as the "Contempt Motion"), by order to show cause dated December 3, 1975. This motion was served on December 3, 1975 by hand upon defendant's attorneys.

11. Later in the day on December 3, 1975, defendant's attorneys served and filed two affidavits in response to the Contempt Motion. On December 9, 1975, the return date of the Contempt Motion, defendant's attorneys cross-moved for an order (a) staying execution of the Installment Payment Order pending appeal, and (b) modifying the Installment Payment Order. On December 9, 1975, Judge Carter granted the motion to adjudge defendant in contempt and denied defendant's cross-motions. Your deponent served a proposed order in connection with the contempt motion with a settlement date of December 11, 1975. Late in the afternoon of December 9, 1975, defendant served the instant

motion papers for a stay of the Installment Payment Order to this Court. Although the affidavit of Leslie D. Corwin, Esq., suggests to the contrary, no motion for a stay of the contempt order has been sought and, in any event, the settlement date for the contempt order is December 11, 1975.

12. This afternoon defendant's attorneys informed me that yesterday afternoon the motion for a stay of the Installment Payment Order was renewed before Judge Carter ex parte and denied once again.

13. A request for relief from the order relating to contempt is premature on its face. Since no contempt order has been signed, nor a stay of the Contempt Order sought in the District Court, any request for a stay of the Contempt Order must be denied. Significantly, the pending notice of motion is addressed solely to the Installment Payment Order.

14. Clearly, even if a stay were granted at this time, it would not be retroactive and would not relieve defendant of his responsibility for the default and contumacious behavior in failing to make the installment payments previously due in the aggregate sum of $34,031.34. 9 Moore's Federal Practice §208.05, (p. 1413) Defendant's sole benefit from a stay of the Installment Payment Order would be the temporary relief from his obligation to make the payments of $4,253.93 due January 1, 1976, and the first day of each month thereafter. In the event defendant is able to obtain some modification of the Installment Payment Order, obviously he would be able to obtain full credit for payments made during the

pendency of this appeal. Thus, there can be no claim that he would be irreparably harmed in the absence of a stay.

15. Defendant's laches offers yet a further reason for denial of the motion for a stay. The Installment Payment Order was entered on October 31, 1975. Defendant received $26,041.67 from General Cigar Corp., as a result of that order on or about November 7, 1975 (defendant's attorneys received those funds on or about November 5, 1975) and no application for a stay nor for any modification of the Installment Payment Order was made until December 9, 1975, nearly six weeks later, and over two and a half weeks after the notice of appeal was served.

16. Since it is impossible on the short notice* afforded to our firm in connection with this motion to adequately refute the asserted grounds for the appeal of the Installment Payment Order, it should be noted that the asserted grounds were fully considered by Judge Carter in his opinion (Exhibit 3), and who twice denied the requested stay. There is obviously no basis for the claim of insufficient evidence and the absence of a hearing since voluminous evidence was submitted in connection with the motion below and defendant had ample opportunity to request a hearing or submit whatever evidence he wished on a number of

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* Although our office was served with a copy of the motion at approximately 4 p.m., on Tuesday, December 9, it was not until 2 p.m., on Wednesday, December 10, that we were informed by our adversary that our responding papers were due by 5 p.m., December 10. It should be noted, however, that our adversary made every effort to reach this office in the morning, but was unable to reach the attorneys handling this matter through no fault of our adversaries.

occasions. Similarly inappropriate is the reliance on defendant's illness, which was fully considered prior to the granting of the installment payment motion (see Exhibit 3).

17. If there is a party that may be irreparably harmed by the decision on the pending motion, it is plaintiff whose judgment, now nearly two years old, has gone totally unpaid as a result of what the District Court has found, in effect, to be a plan to divest the defendant of assets with a view to frustrating the judgment of this Court. Defendant,who admittedly received the $26,041.67 in November (together with the monthly payments from General Cigar and Master Packaging), and has been found in contempt of an order of the District Court, may well, if left unpunished for even a limited further period, treat the stay as an opportunity for an even further diversion of assets, including the monies just received.

18. Significantly, defendant has not offered or submitted the supersedeas bond required pursuant to Rule 62 (d) of the FRCP and Rule 33 of the General Rules of the Southern District. In the event this Court would consider granting a stay pending appeal based on supersedeas bond in an amount less than the full judgment plus 11% interest and $250 costs, then,at a bare minumum, that bond must be in an amount equivalent to the aggregate sums due under the Installment Payment Order at any given time (with a provision to increase the bond monthly), plus 11% and costs, as provided in Rule 33.

19. The intentional disregard of an order of this Court must be viewed in the context of the recent history of defendant's conduct:

(i) In the underlying action, his denials of execution and ratification of a guarantee were rejected at trial and his repudiation of his signature on certain documents fully exposed as false by a handwriting expert (see Exhibits 1 and 2);

(ii) Within days of the original decision of the Court, defendant conveyed his principal assets to his son to satisfy some non-existent obligation and then proceeded upon a campaign designed to frustrate the judgment, in which the Court found that he "has diverted or otherwise secreted" certain assets, and in some instances testified falsely under oath with respect to the ownership of assets (Exhibit 3).

20. Thus, the intentional refusal to comply with the order of this Court follows what has been an almost unprecedented campaign of deception designed to frustrate judicial process. If ever a party made an application for discretionary relief with "unclean hands", it is this defendant.

WHEREFORE, your deponent respectfully requests that the motion for a stay be denied.

VICTOR A. KOVNER

Sworn to before me this
10th day of December, 1975

HELEN [illegible]OPKINS
Notary Public, State of New York
No. 24 6058451
Qualified in Kings County

DSA-68

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

WEITNAUER TRADING COMPANY, LTD., :

Plaintiff, :

- against - : 71 Civ. 782

MORTON L. ANNIS, :

Defendant. :

- x

A P P E A R A N C E S:

Messrs. Wikler Gottlieb Taylor & Howard
40 Wall Street
New York, New York 10005
Attorneys for Plaintiff

Trial Counsel
Lankenau Kovner Bickford & Abrons, Esqs.
30 Rockefeller Plaza
New York, New York
by: Victor A. Kovner, Esq.

Messrs. Newman, Rich, Krinsly, Poses
& Katz
99 Park Avenue
New York, New York 10016
Attorneys for Defendant

CARTER, District Judge

O P I N I O N

The issues in this case do not appear to be unduly complex. Defendant, as officer and director of the General Cigar Co., had dealings with plaintiff, a Swiss corporation engaged in the wholesale and retail distribution of wines and liquors, as well as a variety of other items not pertinent to this controversy. In May and July, 1968, defendant met in Basel, Switzerland with plaintiff's representative. Defendant was interested in the organization of a United States wine and liquor import facility. On October 16, 1968, at a third meeting of the parties on the subject, an agreement was reached and signed. The agreement provided that plaintiff was to purchase liquors and wines in Europe, and defendant was to have charge of the sale and distribution of these products in the United States, with each party to share equally in the profits.

Most of the dealings between plaintiff and defendant were conducted on plaintiff's behalf by one of its Assistant Vice Presidents, Fritz Meier. For about six months after the agreement was signed, nothing concretized to put the agreement into effective operation. Defendant was engaged in attempting to set up the American import company but with no apparent success. Then on

April 9, 1969, defendant advised Meier by letter that a corporation, Intercontinental Wine and Spirits Co. (Intercontinental), had been organized, and that he and the corporation's President Ronald Kassin and Sales Manager Ed Radash were arriving in Basel on the afternoon of April 24 to discuss with Meier "our liquor situation." A prospectus of Intercontinental was attached to this communication.

On April 24, 1969, the meeting was held as scheduled. At that meeting it was agreed that plaintiff would advance to Intercontinental a credit of $40,000 in exchange for which Intercontinental on going public was to issue to the plaintiff convertible bonds, which action Intercontinental appeared prepared to take in the near future. The following procedure was agreed upon: plaintiff, acting as purchasing agent for Intercontinental, would contact suppliers, recommend products and labeling; and after arrangements on prices of the products had been agreed upon between Intercontinental and the suppliers, Intercontinental would order directly from the suppliers. Plaintiff assumed liability for the order by confirming it with the supplier. Plaintiff would pay the invoices when due, and bill Intercontinental, adding a 10% mark up. Of this additional amount, 4% was to be credited to Intercontinental's account

and held by plaintiff to be applied to expenses incurred in Europe on Intercontinental's behalf; the remaining 6%, after certain deductions, was to be divided equally between plaintiff and defendant pursuant to a private agreement between the parties, which defendant requested plaintiff not reveal to defendant's partners in Intercontinental.

By the late summer of 1969, Intercontinental's orders had reached $100,000, and plaintiff refused to act as purchasing agent for Intercontinental without securing a personal guarantee from defendant committing him personally to liability up to $100,000. In September, 1969, Meier spoke to defendant by telephone demanding his personal guarantee on orders confirmed by plaintiff, and Meier travelled to New York for the purpose of securing such a guarantee. Plaintiff's New York counsel prepared the necessary form, and Meier presented it to defendant at a dinner meeting at the "21" Club on September 24 or 25. Defendant did not sign the guarantee at that time but kept a copy of it indicating to Meier he wanted to have his lawyer study and review it before deciding whether to sign it.

Meier returned to Basel without defendant's signature on the proposed guarantee. On October 1, 1969,

Intercontinental advised plaintiff by telegram that an unsigned copy of the guarantee was being mailed and that a signed copy was being delivered to plaintiff's New York counsel. This was followed by a telegram from defendant, Annis, dated October 6, stating that the guarantee had been signed and presented to plaintiff's lawyer the preceding week. On or about October 6, plaintiff received the executed guarantee. It had been retyped on Intercontinental's stationery, is dated September 30, 1969, and contains the signature of Kassin and a signature purporting to be defendant's, both witnessed by a Henry Keiser.

At trial, plaintiff produced a handwriting expert who testified that in his opinion the signature on the September 30 document is defendant's. Defendant, at trial, did not controvert the testimony as to the genuiness of his signature on the September 30 document; he merely testified that he did not remember signing the document in question.

The September 30 agreement commits the signatories to pay "all amounts up to ... $100,000 ... with interest, and without deduction for any claim or set off or counterclaim of Intercontinental the full amount of all obligations or indebtednesses due [the plaintiff] from Intercontinental, together with all expenses of

collection and reasonable counsel fees incurred by [plaintiff] by reason of the default of Intercontinental."

After receiving the September 30 document, plaintiff resumed functioning as Intercontinental's purchasing agent. Soon, however, Intercontinental's orders were in excess of the $100,000 guarantee. Plaintiff advised Kassin that it would be prepared to advance another $30,000 on receipt of a guarantee signed by defendant similar to the September 30 document. At a meeting in Basel, Switzerland on November 20, 1969, defendant agreed to increase this guarantee to $150,000 on condition that in addition to Kassin, a Leonard Fellman also be a co-guarantor.

On January 13, 1970, plaintiff advised defendant by letter that Intercontinental had placed orders in excess of the limits of the guarantee and that Intercontinental had cabled plaintiff indicating a willingness to increase the guarantee to $150,000. Plaintiff received a letter from defendant dated January 19, 1970, making reference to plaintiff's communication of January 13 and stating "I am certainly in agreement to raise this to $150,000."

On January 19, 1970, plaintiff received a letter amending the guarantee contained in the September 30 document and raising the guarantee to $150,000. It is conceded that this letter was not signed by defendant, and no liability can be attached to him on a basis of that document standing alone.

Thereafter, the whole enterprise turned sour. On September 22, 1970, plaintiff wrote defendant that the total amount due them up to August 31, 1970 was $174,496.20, and insisted on payment immediately, if not from Intercontinental, then from defendant pursuant to the guarantee. Further correspondence followed an attempt to work out the dispute, but these efforts resulted, in plaintiff's view, in insufficient payment for the sums expended. In January, 1971, plaintiff turned the matter over to its New York counsel to litigate.

On January 18, 1971, defendant in a letter to New York counsel in answer to a communication of January 12, 1971, states "First, the guarantee is by three people and there are very definite limitations on this guarantee." In a letter dated the same day to H. Thomann, a plaintiff official, defendant states ...

> "let me refresh your memory as to the status of the guarantee. First of all this guarantee was agreed to by three parties, Mr. Kassin, Mr. Fellman and myself. An amount of $40,000 was frozen as this was allocated to purchase an option to buy stock when the company went public. An additional $60,000 was credit given to the company, and any amount over $100,000 was jointly guaranteed by the three individuals.

Finally, in a letter dated February 19, 1971, defendant for the first time advised plaintiff that he had never committed himself to liability in case of default by Intercontinental.

A copy of the ledger of plaintiff contains a full and complete account showing expenditures on behalf of Intercontinental by plaintiff of $171,158.60.

II

The record stands uncontroverted as to plaintiff's claim that defendant committed himself to a personal guarantee of $100,000. That claim has been clearly established by a fair preponderance of the evidence. See Glasberg v. Krauss, 24 App. Div. 2d 425 (1965); Application of Erin Wine & Liquor Store, Inc., 283 App. Div. 443, aff'd sub. nom. Erin Wine & Liquor Store, Inc. v. O'Connell, 307 N.Y. 768 (1954).

The document in question is on the letterhead of Intercontinental, and plaintiff has produced expert testimony indicating that the signature on the document is that of defendant. Defendant's failure of memory as to his signing the document does not rise to the level of denying that the signature is his. I find plaintiff's claim that defendant executed the letter guarantee dated September 30, 1969, has been established. Pursuant to that guarantee and in reliance upon it plaintiff assumed responsibility for Intercontinental's orders.

Defendant's further responsibility for inducing plaintiff to advance monies in excess of the original $100,000 guarantee has also been established by a fair preponderance of the evidence. Defendant met in Basel in November, 1969, with plaintiff and agreed to increase his personal guarantee to $150,000 provided Leonard Fellman signed the guarantee with him and Kassin. Plaintiff wrote defendant on January 13, 1970, to which letter defendant responded on January 19, 1970. In that response defendant explicitly states that he agrees to raise the guarantee to $150,000 commitment. Moreover, in his letter of January 18, 1971, to plaintiff's counsel, defendant does not deny that he executed such a guarantee, but states that the commitment is by three people. In a letter the same day to Thomann, defendant admits that he has committed himself to a guarantee in excess of $100,000. Since his liability of $100,000 has already been established, these referred-to communications, the authorship of which is not disputed, constitute an admission that he committed himself to the $150,000 guarantee for which he is being sued. It is clear that plaintiff was induced to believe such was defendant's commitment, and pursuant to that understanding plaintiff expended the amounts proved at the trial.

The issue, however, is whether plaintiff's claim as to defendant's liability for the guarantee over $100,000 is barred by the statute of frauds. The single written document that contains this guarantee admittedly was not signed by the defendant. Defendant's liability may be sustained on two grounds, however. The law of New York does not require that the writing binding the party be expressed only in a single document. The statute of frauds is satisfied where separate writings are connected with one another or by the internal evidence of the subject matter, or where the occasion can be pieced together to provide all the essential terms of the agreement, and the result evidences an in praesenti intent of the parties to form a binding agreement. The plaintiff's January 13, 1970, letter and the defendant's January 19, 1970, reply read together are sufficient to meet that test of the statute of frauds. See Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48 (1953); Brause v. Goldman, 10 App. Div. 2d 328 (1st Dept. 1960), aff'd 9 N.Y. 2d 620 (1961); Lalonde v. Modern Album & Finishing Co., 33 App. Div. 2d 960 (2d Dept. 1972).

Moreover, even though defendant did not sign the subsequent guarantee, he had sufficient subsequent contacts, personally and by letter, with the plaintiff to realize that plaintiff was under the mimpression that he

had committed himself for a further $50,000 guarantee. At no time did he disabuse plaintiff of the impression that he had in fact signed the document. Only after this litigation did defendant raise issue concerning the genuiness of his signature. Because of these acts, together with his letter of January 19, 1970, and his letters of January 18, 1971, defendant is estopped from denying that he is bound by the further guarantee. See Electrolux Corp. v. Val-Worth, Inc., 6 N.Y. 2d 556 (1959); Bisbing v. Sterling Precision Corp., 34 A.D. 2d 427 (1970). I, therefore, conclude that defendant's liability for a total guarantee of $150,000 has been established.

The counterclaim alleging that $40,000 of the amount in question was for Intercontinental convertible bonds is without merit. Those bonds were never issued. There is no reference to them in any of the documents evidencing the guarantee; and indeed, the guarantee specifically bars any set-off or counterclaims as to Intercontinental. The argument that the guarantee involved referred to a $150,000 guarantee to a New York bank is also without merit. The correspondence between the parties refers to defendant's guarantee in order for plaintiff to assume responsibility for orders of Intercontinental to various European suppliers. Defendant's guarantee to a New York bank would have no reference to that.

CONCLUSION

The defendant's liability for reasonable collection expenses and counsel fees in the amount of $32,065.44 to date has been established. The evidence indicates that defendant committed himself to guarantee up to $150,000, plus interest, for any debts which plaintiff incurred on behalf of Intercontinental. Judgment is therefore awarded against defendant in the sum of $32,065.44 for expenses and counsel fees to date, and judgment for $150,000, plus interest at 6% from the date of the filing of this action.[1]

SO ORDERED.

Dated: New York, New York
June 12, 1974

Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

1. Parts I and II above constitute the court's findings of fact and conclusions of law.

DSA-80

EXHIBIT 2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 673—September Term, 1974.

(Argued April 7, 1975 Decided May 28, 1975.)

Docket No. 74-2276

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Appellee,

v.

MORTON L. ANNIS,

Defendant-Appellant.

Before:

HAYS, GURFEIN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Robert L. Carter, *Judge,* holding defendant liable on agreements of guaranty.

Affirmed.

NORTON I. KATZ, Esq., New York, N. Y. (Leslie D. Corwin, Esq. and Rich, Krinsly, Poses, Katz & Lillienstein, of Counsel), *for Defendant-Appellant.*

VICTOR A. KOVNER, Esq., New York, N. Y. (John C. Lankenau, Esq., Wikler Gottlieb Taylor

& Howard, and Lankenau Kovner & Bickford, of Counsel), *for Plaintiff-Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

This action was brought to recover on two writings, the first guaranteeing payment of a corporate indebtedness up to $100,000 and the second guaranteeing payment of an additional indebtedness up to $50,000. Defendant-appellant did not recall signing the first and denied signing the second.

The testimony of an eyewitness to the signing, buttressed by a handwriting expert and appellant's admissions, satisfied the District Court that the signature on the $100,000 guaranty was appellant's. Absent any proof from appellant beyond a professed inability to recall, this finding was clearly dictated.

Appellant's memory concerning the second guaranty was more accurate. He did not sign it. Instead, his name was affixed by a business associate who purported to act as appellant's agent in so doing. Since we approve the District Court's holding that appellant was liable on this agreement also, we state briefly the basis for our approval.

Appellee is a Swiss Corporation which acts as the purchasing agent and distributor for a number of products, including tobacco, perfume, cosmetics and alcoholic beverages. In 1969, appellant formed a small liquor import corporation called Inter/Continental Wine and Spirits, Ltd. with its office in Lake Success, New York. That company engaged appellee as its European purchasing agent.

Under the agreement between the two companies, appellee located sources of supply and Inter/Continental issued purchase orders. These were confirmed by appellee which also assumed liability for payment. Appellee then

paid the invoices when due and billed Inter/Continental for the amount of the invoices plus a commission.

Since the balance sheet of Inter/Continental Wine and Spirits, Ltd. was somewhat less impressive than its name, appellee refused to confirm Inter/Continental's original orders approximating $100,000 until appellant personally guaranteed payment of Inter/Continental's indebtedness. On September 30, 1969, such guaranty was signed by appellant and delivered to appellee's New York attorneys. On October 6, 1969, appellant informed appellee by cablegram that this had been done.[1]

Shortly thereafter, orders submitted by Inter/Continental exceeded $100,000; and, at a meeting in Switzerland on November 20, 1969, appellant was asked to increase his guaranty by $50,000. Appellant agreed to do this upon the understanding that Ronald Kassin and Leonard Fellman, two of his associates at Inter/Continental, would also sign.

Several months later, appellee received a letter dated January 14, 1970, which increased the amount of the personal guaranty from $100,000 to $150,000. This bore the signatures of Messrs. Kassin and Fellman and one that was ostensibly appellant's. Although Mr. Fellman was not called as a witness, Mr. Kassin testified that Mr. Fellman had signed appellant's name to this letter. Mr. Kassin also stated that appellant had told Mr. Fellman in Mr. Kassin's presence that if anything came up when appellant was out of town, Mr. Fellman could sign appellant's name.

On January 19, 1970, appellant sent a letter to appellee in which he stated, among other things: "I am certainly in agreement to raise this to $150,000."

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1 In an affidavit submitted in opposition to appellee's motion for summary judgment, appellant stated that the signature on the $100,000 guaranty appeared to be his and that he was unable to deny its validity.

Subsequent to the receipt of these two letters, appellee increased its grants of credit to Inter/Continental until they were in excess of $174,000. As might be expected, there was a continued exchange of correspondence relative to this indebtedness, and several references to the guaranty were made therein.

A letter from appellee to appellant on December 9, 1970 specifically directed his attention to both the original and amended guaranty and stated that, in the event payment was not made by Inter/Continental, appellee would make use of the personal guaranties. A similar letter was sent on December 31, 1970. In reply, appellant wrote a letter in which he stated that "this guarantee was agreed to by three parties, Mr. Kassin, Mr. Fellman and myself", and that "any amount over $100,000 was jointly guaranteed by the three individuals."

It was not until after appellee indicated its unequivocal intention to proceed with this litigation that appellant denied the authenticity of his signature on the amended guaranty.

It thus appears that, although proof that Fellman had authority to sign appellant's name was far from overwhelming, appellant's subsequent approval of what Fellman had done was clearly established. Since it is hornbook law that lack of prior authority may be supplied by subsequent approval (Mechem, *The Law of Agency*, 2d ed. Vol. 1, §344), the District Court properly held appellant liable on the amended guaranty.

There is no Statute of Frauds problem here. Under New York law, the memorandum required by the Statute need not be incorporated in a single document but may be pieced together from several documents which relate to each other. *Crabtree* v. *Elizabeth Arden Sales Corp.*, 305 N.Y. 48 (1953); *LaLonde* v. *Modern Album and Finishing Co.*, 38 A.D. 2d 960 (2d Dept. 1972); Restatement

of Contracts §208. Moreover, such documents need not be in existence at the time the contract is made but may be supplied at a later date. *Papaioannou* v. *Britz*, 285 App. Div. 596 (2d Dept. 1955); *La Londe* v. *Modern Album and Finishing Co., supra;* Restatement of Contracts §214. Appellant's letter, which adopted the guaranty "agreed to by three parties, Mr. Kassin, Mr. Fellman and myself", was sufficient to satisfy the requirements of the Statute.

Appellant's counterclaim, based on the agreement of appellee to purchase $40,000 worth of convertible bonds of Inter/Continental when issued, merits no more than the summary rejection it received from the trial court. The bonds were never issued.

Appellant's contention that there was insufficient proof of the amount of Inter/Continental's indebtedness is equally without merit. The complaint alleged an indebtedness in excess of $150,000 and, under Rule 8(d) of the Federal Rule of Civil Procedure, this averment was admitted by appellant's failure to deny. Photocopies of appellee's ledger sheets, properly substantiated, were introduced into evidence, and these supported the uncontroverted allegations of the complaint.

Putting it all together, what we have here is a valiant attempt to escape from an obligation rightly owed. The District Court was not persuaded by appellant's arguments. Neither are we.

We affirm.

EXHIBIT 3 is printed at
(A 307 - A 329)

EXHIBIT 4 is printed at
(A 330 - A 332)

UNITED STATES COURT OF APPEALS

DSA-87

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of December, one thousand nine hundred and seventy-five.

Weitnauer Trading Company, Ltd.,

Plaintiff-Judgment Creditor-
Appellee,

v.

Morton L. Annis,

Defendant-Judgment Debtor-
Appellant.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellee~~ ~~petitioner~~ ~~respondent~~

by notice of motion dated December 9, 1975 for a stay pending determinnation ~~xxxxxxxxxxxxx~~ of the appeal

be and it hereby is granted ~~denied~~ on consideration that appellant shall post a $50,000.00 supersedeas bond on or before Monday December 15, 1975.

It is further ordered that appellant shall file thearecord on or before December 19, 1975 and file a brief and joint appendix on or before December 31, 1975; appellee shall file a brief on or before January 9, 1976 and the appeal shall be set for argument during the week starting January 14, 1976.

A. Daniel Fusaro
Clerk

By Edward J. Guardaro
Senior Deputy Clerk

Before:

~~HON. JAMES L. OAKES~~

~~HON. ELLSWORTH A. VAN GRAAFEILAND~~

~~HON. THOMAS J. MESKILL~~

Circuit Judges

DSA-88

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor-Appellee,

v.

MORTON L. ANNIS,

Defendant-Judgment Debtor-Appellant.

----------X

71 CIVIL ACTION 782

MOTION FOR STAY PENDING APPEAL

75-7669

Defendant-Judgment Debtor-Appellant moves the Court to modify the order of this Court made and entered December 11, 1975 by eliminating that portion therof that reads "on consideration that appellant shall post a $50,000.00 superseadeas bond on or before Monday December 15, 1975.", pending the disposition of the defendant-judgment debtor-appellant's appeal to this Court from a certain order of the United States District

Court for the Southern District of New York,, made and entered herein on October 30, 1975.

Dated: New York, N.Y.
December 16, 1975

RICH, KRINSLY, POSES, KATZ &
LILLIENSTEIN, ESQS.,
Attorneys for Defendant-Appellant
Office & P.O. Address
99 Park Avenue
New York, New York 10016
(212) 867-7200

BY: _____
NORTON I. KATZ
Member of the Firm

TO: LANKENAU, KOVNER & BICKFORD, ESQS.,
Attorneys for Plaintiff-Respondent
30 Rockefeller Plaza
New York, New York 10020

DSA-90

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

WEITNAUER TRADING COMPANY, LTD., 71 CIV 782

Plaintiff-Judgment Creditor-
Appellee

AFFIDAVIT

-against-

MORTON L. ANNIS, 75-7669

Defendant-Judgment Debtor-
Appellant

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LESLIE D. CORWIN, being duly sworn, deposes and says:

1. I am an attorney associated with the law firm of RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, attorneys for the defendant-appellant herein, and I am fully familiar with all the facts and proceedings heretofore had herein. This affidavit is submitted in support of the defendant-appellant's motion to modify the order of this Court made and entered December 11, 1975. A copy of the order is annexed hereto.

2. The defendant-appellant is unable to post a $50,000 superseadeas bond as directed by this Court's order.

My firm, through Norton I. Katz, Esq. so advised this Court by a letter of December 15, 1975 to Nathaniel Fensterstock, Esq. counsel for the Court. Annexed hereto and marked Exhibit One is a copy of Mr. Katz's letter.

3. Accordingly, by this motion, defendant-appellant seeks to stay enforcement of the October 30, 1975 order pending his appeal to this Court without being required to post any bond.

4. The necessity for urgent hearing of this motion this morning is that an order directing the United States Marshal to incarcerate the Defendant-Judgment Debtor-Appellant, is noticed for settlement before Judge Carter at 11:00 A.M. today, December 16, 1975. Annexed hereto, marked Exhibit 2 and made a part hereof is a copy of said order with Notice of Settlement.

5. To hold the defendant-appellant in contempt and to order him incarcerated without holding an evidentiary hearing as to his ability to meet the payments under the installment payment order, is unconstitutional and a violation of due process of law.

6. Therefore, by this motion, defendant-appellant is likewise seeking to stay the signing by Judge Carter of the order (Exhibit 2) holding him in contempt and directing his incarceration, pending the disposition of his appeal to this Court.

7. In all other respects, defendant-appellant is willing to abide by this Court's order of December 11, 1975.

Leslie D. Corwin

LESLIE D. CORWIN

Sworn to before me this

16th day of December, 1975.

Rhoda Weinstein

Notary

RHODA WEINSTEIN
NOTARY PUBLIC, State of New York
No. 30-01WE1000615
Qualified in Nassau County
Commission Expires March 30, 19 77

DSA-93

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN
99 PARK AVENUE · NEW YORK, N.Y. 10016
867-7200
CABLE ADDRESS: INTAVOCAT

HENRY J. KRINSKY (1886-1970)
ARTHUR L. NEWMAN (1903-1970)
SAMUEL POSES
CLIFFORD H. RICH
STUART Z. KRINSLY
NORTON I. KATZ
MAXWELL J. LILLIENSTEIN
LESLIE D. CORWIN
ANITA L. POMERANCE

JOSEPH KASKELL
RUDOLF B. SCHLESINGER
ROBERT P. LEVINE
NEIL D. HIRSCHFELD
COUNSEL

December 15, 1975

Nathaniel Fensterstock, Esq.
United States Court of Appeals
Clerks' Office, Room 1702
Foley Square,
New York, New York 10007

Re: Weitnauer Trading Company Ltd.,
-vs- Morton L. Annis
71 Civ. 782
Court of Appeals No. 75-7669

Dear Sir:

On December 9th, the Court of Appeals issued an order staying an installment payment order of the District Court on condition that the defendant-debtor furnish a $50,000.00 bond by today. The issuance of an order by the District Court finding the defendant-debtor in contempt and directing his imprisonment was withdrawn by the attorney for the plaintiff-creditor and a new order was submitted for settlement tomorrow, December 16th. The pending appeal is from the order directing installment payments, since the contempt order is not yet issued.

We have been advised by our client, the defendant-debtor-appellant, that he is unable to provide the required bond. We have also been informed, both by him and the attorney for the judgment-creditor, that our client, with our consent, has communicated directly with the creditor's attorney in order to effect some settlement of the judgment.

The purpose of this letter is two-fold. First, to advise the Court of the foregoing facts, and secondly, to express the personal view of the undersigned that the interests of justice would be better served if the threatened imprisonment of the defendant were withheld, without condition. My view in that regard is based on the facts

that no evidentiary hearing was held by the District Court preliminary to its proposed contempt order and that the appeal now pending from the installment payment order founding the contempt has been set by the Court for an expedited schedule which will result in a hearing of the appeal during the week of January 14, 1976. It is our view that nothing meaningful would be attained if the defendant were now imprisoned during the short interval pending appeal and while his very discussions relating to settlement of the judgment are engaged in under the threat of immediate imprisonment.

Again we emphasize that this is a personal view of the undersigned which is submitted as an officer of the Court.

Respectfully yours,

NORTON I. KATZ

NIK:rw

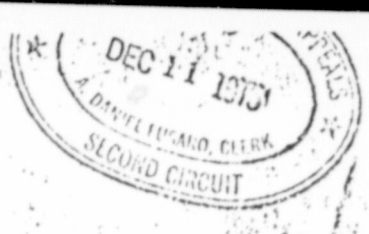
CC: Hon. Robert L. Carter,
U. S. District Court.

Lankenau, Kovner & Bickford, Esqs.,
Attention: Victor A. Kovner, Esq.

DSA-95

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of December, one thousand nine hundred and seventy-five.

15 1669

Weitnauer Trading Company, Ltd.,

Plaintiff-Judgment Creditor-Appellee,

v.

Morton L. Annis,

Defendant-Judgment Debtor-Appellant.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellee~~ ~~petitioner~~ ~~respondent~~

~~by notice of motion~~ dated December 9, 1975 for a stay pending determination of the appeal

be and it hereby is granted ~~denied~~ on consideration that appellant shall post a $50,000.00 supersedeas bond on or before Monday December 15, 1975.

It is further ordered that appellant shall file the record on or before December 19, 1975 and file a brief and joint appendix on or before December 31, 1975; appellee shall file a brief on or before January 9, 1976 and the appeal shall be set for argument during the week starting January 14, 1976.

A. Daniel Fusaro
Clerk

By Edward J. Guardaro
Senior Deputy Clerk

Before: HON. JAMES L. OAKES

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. THOMAS J. MESKILL

Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD., Plaintiff, -against- MORTON L. ANNIS, Defendant.	71 Civ. 782 (RLC) ORDER ADJUDGING DEFENDANT IN CONTEMPT

This matter came on for hearing on December 9, 1975 on motion of Lankenau Kovner & Bickford, attorneys for plaintiff, for an order punishing MORTON L. ANNIS, defendant, for a contempt of an installment payment order of this Court entered October 31, 1975 (the "Order"), and the Court having considered the affidavit of Victor A. Kovner in support of such motion, the affidavits of Norton I. Katz and Leslie D. Corwin, attorneys for defendant, the affidavit of Victor A. Kovner in reply, and having heard argument by both parties, and the Court having been informed that on December 11, 1975, the United States Court of Appeals, upon defendant's request, granted a stay of the Order on condition that defendant file a supersedeas bond in the amount of $50,000 no later than December 15, 1975, and on further condition that defendant file the Record on Appeal from the Order no later than December 19, 1975, and file defendant's brief no later than December 31, 1975 (and also requiring plaintiff to file its answering brief by January 9, 1976) so as to permit argument of said appeal during the week of January 14, 1976,

and being fully advised, the Court makes the following

FINDINGS OF FACT

1. Before the return date of this motion, defendant had notice of the Order of this Court entered October 31, 1975 directing him to make certain installment payments.

2. On or about November 7, 1975, defendant received the sum of $26,041.67 from which he was to make the past-due installment payments, pursuant to the Order and in addition, defendant received additional monies from which installment payments were to be made.

3. Defendant has willfully and intentionally refused to comply with the Order by failing to make the installment payments due on October 31, November 1 and December 1, 1975, in the aggregate amount of $34,031.34.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that said MORTON L. ANNIS is guilty of contempt of this Court in refusing to make the installment payments heretofor required, pursuant to the Order of this Court entered October 31, 1975, it is further

ORDERED, that the said MORTON L. ANNIS pay a fine in the sum of $34,031.34 and $, as the costs of this proceeding,

including $ as attorneys' fees, such fine and costs to be payable to Lankenau Kovner & Bickford, attorneys for plaintiff, payment of which fine shall be in reduction of the outstanding judgment entered September 19, 1974, and it is further

ORDERED, that said MORTON L. ANNIS be confined to the New York Federal House of Detention until the aforesaid fine of $34,031.34, together with the costs, are paid; and that a United States marshal, upon receipt of a certified copy of this order, be directed to take said MORTON L. ANNIS in custody, wherever he may be found, and transport and deliver him to the Federal House of Detention of New York, and commit him as aforesaid, pending payment of the aforesaid fine.

Dated: December , 1975.

U.S.D.J.

C 14

DSA-99

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of December, one thousand nine hundred and seventy-five.

Weitnauer Trading Company, Ltd.,

Plaintiff-judgment Creditor-
Appellee,

v.

Morton L. Annis,

Defendant-Judgment-Debtor-
Appellant.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellee~~ ~~petitioner~~ ~~respondent~~

~~by notice of motion~~ dated December 16, 1975 for a stay pending appeal

be and it hereby is ~~granted~~ denied,

~~It is further ordered that~~

Walter R Mansfield
WALTER R. MANSFIELD

JAMES L. OAKES

ELLSWORTH VAN GRAAFEILAND
Circuit Judges

DSA-100

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -X

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff,

-against-

MORTON L. ANNIS,

Defendant.

- -X

71 Civ. 782 (RLC)

ORDER ADJUDGING DEFENDANT IN CONTEMPT

This matter came on for hearing on December 9, 1975 on motion of Lankenau Kovner & Bickford, attorneys for plaintiff, for an order punishing MORTON L. ANNIS, defendant, for a contempt of an installment payment order of this Court entered October 30, 1975 (the "Order"), and the defendant having cross moved on December 9, 1975 for a stay of execution of any proceedings to enforce the Order and for an order to modify or amend the Order and the Court having considered the affidavit of Victor A. Kovner dated December 3, 1975 in support of the motion, the affidavits of Norton I. Katz and Leslie D. Corwin, both dated December 3, 1975, attorneys for defendant, the affidavit of Victor A. Kovner in reply dated December 8, 1975 and an affidavit of Leslie D. Corwin in opposition dated December 8, 1975, and having heard argument by both parties, and the Court having denied the defendant's cross motion, and the Court having been informed that on

December 11, 1975, the United States Court of Appeals, upon defendant's motion, granted a stay of the Order on condition that defendant file a supersedeas bond in the amount of $50,000 no later than December 15, 1975, and on further condition that defendant file the Record on Appeal from the Order no later than December 19, 1975, and file defendant's brief no later than December 31, 1975 (and also requiring plaintiff to file its answering brief by January 9, 1976) so as to permit argument of said appeal during the week of January 14, 1976, and such supersedeas bond not having been filed and being fully advised, the Court makes the following

FINDINGS OF FACT

1. Before the return date of this motion, defendant had notice of the Order of this Court entered October 31, 1975, directing him to make certain installment payments.
2. On or about November 7, 1975, defendant received the sum of $26,041.67 from which he was to make the past-due installment payments, pursuant to the Order and in addition, defendant received additional monies from which installment payments were to be made.
3. Defendant has wilfully and intentionally refused to comply with the Order by failing to make the installment payments due on October 31, November 1 and December 1, 1975, in the aggregate amount of $34,031.34.

4. At no time subsequent to entry of the Order on October 30, 1975 and prior to the return date of this motion on December 9, 1975 did defendant move or otherwise take any steps to explain or represent to the Court any reasons why he could not comply with the Order and make the payments required thereunder.

NOW, on motion of Lankenau Kovner & Bickford, it is

ORDERED, ADJUDGED AND DECREED that said MORTON L. ANNIS is guilty of contempt of this Court in refusing to make the installment payments heretofore required, pursuant to the Order of this Court entered October 31, 1975; and it is further

ORDERED, that the said MORTON L. ANNIS pay a fine in the sum of $34,031.34 together with $1,095.00 as reasonable attorneys' fees, such fine and fees to be payable to Lankenau Kovner & Bickford, attorneys for plaintiff, payment of which fine shall be in reduction of the outstanding judgment entered September 19, 1974; and it is further

ORDERED, that said MORTON L. ANNIS be confined to the New York Metropolitan Correction Center until the aforesaid fine of $34,031.34, together with the costs, are paid;

and that a United States marshal, upon receipt of a certified copy of tnis order, be directed to take said MORTON L. ANNIS in custody, wherever he may be found, and transport and deliver him to the Metropolitan Correction Center of New York, and commit him as aforesaid, pending payment of the aforesaid fine, but not in excess of six (6) months.

Dated: December 18, 1975.
New York, N.Y.

Robert L. Carter
U.S.D.J.

DSA-104

UNITED STA. . STRICT COURT
SOUTHERN DIS. T OF NEW YORK

----------X

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor

----------X

71 Civ. 782 (RLC)

COUNTER-ORDER ADJUDGING DEFENDANT IN CONTEMPT

This matter came on for hearing on December 9, 1975 on motion of LANKENAU, KOVNER & BICKFORD, attorneys for Plaintiff-Judgment Creditor, for an order punishing MORTON L. ANNIS, Defendant-Judgment Debtor, for contempt of an installment payment order of this Court entered October 30, 1975 (the "Order"); and the Defendant-Judgment Debtor having cross moved for a stay of execution of any proceedings to enforce the Order and for an order to modify or amend the Order, and the Court having considered the affidavit of VICTOR A. KOVNER in support of the motion, the affidavit of LESLIE D. CORWIN in opposition to the motion and in support of the cross motion, the affidavit of VICTOR A. KOVNER in reply, the affidavits of NORTON I. KATZ and LESLIE D. CORWIN, and having heard oral argument by both parties, and having denied the Defendant-Judgment Debtor's cross motion, and the Court having been informed that on December 11, 1975, the United

States Court of Appeals, upon Defendant-Judgment Debtor's motion, granted a stay of the Order on condition the Defendant-Judgment Debtor file a supersedeas bond in the amount of $50,000.00 no later than December 15, 1975, and on further condition that Defendant-Judgment Debtor file the Record on Appeal from the Order no later than December 19, 1975, and file Defendant-Judgment Debtor's brief no later than December 31, 1975 (and also requiring Plaintiff-Judgment Creditor to file its answering brief by January 9, 1976) so as to permit argument of said appeal during the week of January 14, 1976, and such supersedeas bond not having been filed, and being fully advised, the Court makes the following:

FINDINGS OF FACT

1. Defendant-Judgment Debtor was not personally served with a certified or uncertified copy of the Order.

2. No attorney of record for the Defendant-Judgment Debtor was served with a certified or uncertified copy of the Order until the actual motion for contempt was made.

3. There is no proof in the record that the Defendant-Judgment Debtor had knowledge of the terms and provisions of the Order.

4. No evidentiary hearing was held by the Court on the issue of the Defendant-Judgment Debtor's ability to comply

with the Order.

5. On or about November 7, 1975, Defendant-Judgment Debtor received the sum of $26,041.67 from which he was to make the past due installments pursuant to the Order.

6. Defendant-Judgment Debtor has failed to make the installment payments due on October 31, 1975, November 1, 1975 and December 1, 1975, in the aggregate amount of $34,031.34.

NOW, on motion of LANKENAU, KOVNER & BICKFORD, it is ORDERED, ADJUDGED and DECREED that said MORTON L. ANNIS was guilty of contempt of this Court in failing to make the installment payments heretofore required, pursuant to the Order of this Court entered October 30, 1975, it is further

ORDERED, that the said MORTON L. ANNIS pay a fine in the sum of $34,031.34, and $ as attorneys' fees, such fine and fees to be payable to LANKENAU, KOVNER & BICKFORD, attorneys for Plaintiff-Judgment Creditor, payment of which fine shall be in reduction of the outstanding judgment entered September 19, 1974, and it is further

ORDERED, that said MORTON L. ANNIS be confined to the New York Metropolitan Correction Center until the aforesaid

fine of $34,031.34, together with the costs, are paid; and that a United States Marshal, upon receipt of a certified copy of this Order, be directed to take said MORTON L. ANNIS in custody, wherever he may be found, and transport and deliver him to the Metropolitan Correction Center of New York, and commit him as aforesaid, pending payment of the aforesaid fine, but not in excess of six (6) months.

U. S. D. J.

Dated: December 17, 1975.

DSA-108

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 CIV. 782 (RLC)

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor

- against -

MORTON L. ANNIS

Defendant-Judgment Debtor

MOTION FOR STAY OF EXECUTION OF CONTEMPT ORDER

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of LESLIE D. CORWIN, sworn to December 18, 1975, the oral decision of this Court made December 9, 1975 granting Plaintiff-Judgment Creditor's motion for an order punishing the Defendant-Judgment Debtor, MORTON L. ANNIS, for contempt of an installment payment order entered in this Court on October 30, 1975 (the "Order") and directing Defendant-Judgment Debtor's confinement in the New York Metropolitan Correction Center until payment of a fine and costs, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court on the return of the Notice of Settlement of Plaintiff-Judgment Creditor's Proposed order, and Defendant-Judgment Debtor's Counter-Proposed order, at Chambers, on December 18, 1975, at a time to be fixed by the Court by oral notice, for an order staying execution of

that portion of this Court's order made and entered December 18, 1975 which directs that the Defendant-Judgment Debtor be committed, pending determination of Defendant-Appellant's appeal from the said order, provided that Defendant-Appellant shall effect the said appeal on or before January 6, 1976 and shall proceed without delay with the prosecution and argument of the said appeal on any expedited schedule of such appeal which either the Court or the United States Court of Appeals shall establish, and that no bond be required of the Defendant-Judgment Debtor as a condition of the said stay.

and for such other and further relief as to this Court may deem proper.

Dated: New York, N.Y.
December 18, 1975

Yours, etc.

RICH, KRINSLY, POSES, KATZ &
LILLIENTSTEIN, ESQS.
Attorneys for Defendant-
Judgment Debtor,
99 Park Avenue,
New York, New York 10016

NORTON I. KATZ
Member of the Firm

DSA-11C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

WEITNAUER TRADING COMPANY, LTD., 71 Civ. 782 (RLC)

Plaintiff-Judgment Creditor AFFIDAVIT

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor

----------X

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

LESLIE D. CORWIN, being duly sworn, deposes and says:

1. I am an attorney associated with RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, attorneys for the Defendant-Judgment Debtor in these proceedings and I am fully familiar with all the facts and circumstances relating thereto.

2. This affidavit is submitted in support of the Defendant-Judgment Debtor's application for a stay without bond pending appeal from an order of this Court adjudging the Defendant-Judgment Debtor in contempt and directing his imprisonment in the New York City Metropolitan Correction Center until payment of the fine.

3. The grounds for this application are that no useful purpose would be served by imprisonment of the Defendant-Judgment Debtor at the present time, for the following

reasons:

(a) There is now pending, an appeal in the United States Court of Appeals, Second Circuit, from the Order of this Court of October 30, 1975, directing installment payments to be made which Order is the basis for the claimed contempt.

(b) It is the intention of the Defendant-Judgment Debtor to appeal from the Order of this Court adjudging him in contempt and directing his imprisonment promptly after the said order is made and entered, and to proceed expeditiously with the prosecution of the said appeal.

(c) The appeal now pending in the United States Court of Appeals from the Order of October 30, 1975 has been set for an expedited schedule which requires the filing of the record tomorrow, December 19, 1975, the filing of Appellant's brief by December 31, 1975 and the argument of the appeal during the week of January 14, 1975. It that appeal is successful and the defendant should be imprisoned during the interval between entry of the contempt order and entry of the order on appeal the Defendant-Judgment Debtor, admittedly suffering from cancer, would be subject to cruel and unusual punishment without justification in law.

(d) Similarly, if it should be held that the order directing the Defendant-Judgment Debtor's imprisonment was improperly or invalidly issued, and that order be set aside,

the hardship on the Defendant-Judgment Debtor would be multiplied.

4. Both appeals are meritorious in the opinion of the undersigned. Among other reasons, the grounds for such appeals would include the following:

(a) The said order purports to be based upon the provisions of the New York CPLR, §5226. That section requires:

> "Notice of the motion shall be served on the Judgment Debtor in the same manner as a summons or by registered or certified mail, return receipt requested."

This provision was not complied with in that notice was not served in the manner provided.

(b) Again under the State law, contempt based on efforts to enforce money judgments are subject to the provisions of §5104 CPLR. That rule requires that the order, non compliance of which constitutes the basis for the alleged contempt, must be:

> "Enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the Court."

No certified or other copy of the order was ever served upon the Judgment Debtor as required by that provision.

(c) The Civil Rules of the United States District Court for the Southern and Eastern District, Rule 14 (b) provides that:

> "If the alleged contemnor puts in issue his alleged misconduct or the damages thereby occasioned, he shall upon demand therefor, be entitled to have oral evidence taken thereon, either before the Court or before a master appointed by the court."

The affidavit of LESLIE D. CORWIN, sworn to December 8, 1975, and submitted (Page 1) in opposition to the Plaintiff Appellant's motion, expressly placed in issue the Defendant's ability to meet the requirements of the Order. In addition to the issues of mixed fact and law raised by the Corwin affidavit, the said affidavit raised the factual issues that the defendant "is semi-retired and for over a year has suffered from cancer and has been in and out of hospitals; he receives Cobalt treatment and has incurred large hospital bills and related expenses; he is "in dire financial straits and is in no position to meet the stringent monetary requirements for sufficient security for the payment of judgment currently entered against him***"; that the order directed the defendant to pay money "which is not conditioned on the receipt of income"; that the payments which were required to be made by the Order fit within the Federal definition of garnishment contained in the Federal Garnishment Law, 15 USC, Sections 1671 through 1677, which impose a percentage limitation on the amount of earnings

which may be the subject of an installment payment order; that the Order directing that payment out of monies entitled to be received rather than those payments which the Defendant-Debtor was actually shown to have received; that documentary evidence annexed to the Corwin affidavit showed that a basic assumption made by the Court that income to which the Debtor was entitled under the Master Packaging Agreement would continue, was erroneous since the documentation showed that the agreement expired July 2, 1978.

(d) The Corwin affidavit expressly argued that the Defendant-Judgment Debtor should be granted "an opportunity to be examined by the Court or a Magistrate of this Court*** to determine his financial status and his ability to make the installment payments previously ordered. This is his right as a matter of law."

(e) Further, the order for contempt signed by the Court on December 18, 1975, states as a finding of fact that "Defendant had notice of the Order of this Court entered October 30, 1975, directing him to make certain installment payments". That finding is utterly without foundation on the record. The plaintiff made no effort to prove and there was no proof adduced that the defendant had any notice of the Order. The requirement is of personal notice and the record is bereft of any such proof. The fact that a Notice of Appeal was filed by the

Defendant's attorneys does not demonstrate Defendant's knowledge of the terms and provisions of the order, for the only proof in the record shows that the draft Notice of Appeal was prepared by a Florida attorney for the Defendant. ANNIS. This, we submit does not meet the requirements of the kind of notice required to found a contempt citation which would result in personal imprisonment.

(f) I state from my own knowledge and examination of our firm records, that my firm never sent any copy of the order or any summary of the order to the Defendant-Judgment Debtor. In point of fact, no copy of the order was ever served upon us at any time until it was included as an exhibit in the motion papers on this very motion.

(g) Further, the order of December 18, 1975 contains a finding of fact that the Judgment Debtor did not, at any time between October 30, 1975 and the time of this motion, make any motion or other representation to the Court for his failure to respond to the order of the Court. This is a highly unfair finding for the record is entirely bare of any suggestion that the Defendant-Judgment Debtor knew of the installment payment order during that interim. Furthermore, the law is clear that a Judgment Debtor has the right at any time to seek a modification of such an order. McDONNELL v BIRRELL,

321 Fed. 2d. 946 (2d Circuit 1963).

For the foregoing r asons, it is respectfully submitted that the within application for the stay of execution be granted.

Leslie D. Corwin

LESLIE D. CORWIN

Sworn to before me this

18th day of December, 1975

Rhoda Weinstein

RHODA WEINSTEIN
NOTARY PUBLIC, State of New York
No. 30-0IW04600515
Qualified in Nassau County
Commission Expires March 30, 19 76

DSA-117

12/18/75

71 CIV 782 (RLC)

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Thorton Deed

So ordered Robert L Carter

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor

MOTION FOR STAY OF EXECUTION OF CONTEMPT ORDER

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN
Attorneys for Defendant-Judgment Debtor
Office and Post Office Address, Telephone
99 PARK AVENUE
BOROUGH OF MANHATTAN NEW YORK, N. 016
867-7200

To

Attorney(s) for

Service of a copy of the within
is hereby admitted.

Dated,

.....

Attorney(s) for

elbr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff,

v. 71 Civ. 782

MORTON L. ANNIS,

Defendant.

Before:

HON. ROBERT L. CARTER,

District Judge

New York, December 18, 1975
Room 2904 - 2:30 p.m.

APPEARANCES

LANKENAU, KOVNER & BICKFORD, Esqs.,
Attorneys for Plaintiff,
Victor Kovner, Esq.,
Heather Florence, Esq., of Counsel

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, Esqs.,
Attorneys for Defendant,
Leslie Corwin, Esq., of Counsel

- - -

(Case called.)

THE COURT: I have the order which has been presented to me in the form that I asked for, with the addition that I have asked for. I gather, Mr. Corwin, that you have a motion, you asked for a court reporter, et cetera.

MR.CORWIN: The order is signed, then, your Honor.

THE COURT: I haven't signed it yet. I thought what I would do would be, I am going to sign it, but -- that is right. You want it stayed.

MR. CORWIN: That is right.

THE COURT: No reason why I shouldn't sign it.

(Pause.)

THE COURT: Now it is signed.

MR. CORWIN: I now respectfully move for a stay of execution of any proceedings to endorce this order pending defendant's appeal to the United States Court of Appeals, Second Circuit of tis order and of this Court's order of October 30, 1975 as well. I have handed to your Honor a set of motion papers with a 7-page affidavit sworn to by myself today in which I statein detail the reasons for this motion.

THE COURT: Let us not get confused about it.

I have denied the motion for a stay of the October order. That is on appeal, so there really is no point in arguing that.

MR. CORWIN: What I am asking for, is in view of the fact that there is an expedited appeal I have been ordered to follow by the Second Circuit, that is what I am asking for here is a stay of this order of December 18th until such time as this order, as the appeal of the order of October 30th is heard by the Second Circuit.

THE COURT: Now I understand.

MR. CORWIN. Argument has been ordered to be held the week of January 14th. I find it hard to make this application because I feel that there id no useful purpose to be served by imprisoning Mr. Annis at this time. I think in just brief summary, because I have given you a lengthy affidavit on this, I think our reasons are as follows:

I think that in the order of contempt that has just been signed there is a finding of fact, No. 1, that the defendant had notice of the order of this Court entered October 30, 1975 directing him to make the installment payments. I feel that that finding is utterly without foundation on the record. The plaintiff had no record to prove and there was no proof adduced that the defendant had notice of any order, and the requirement is

of personal notice. I feel that hasn't been complied with and I think that since we are under Rule, Federal Rule 69-A, applying the post judgment procedures of the New York CPLR, I think that the notice requirements of CPLR5226 on installment paymentorders and of CPLR Section 5104 on contempt orders have not been complied with. My second reason is that there has been no evidentiary hearing held by this court or a Magistrate of this court as to the issue of this defendant's ability to comply with the installment payment order.

THE COURT: That is not true. That was the whole basis of my October 30th opinion. It went into his ability to pay and I concluded he had that especially. So you can't say that. And the hearing insofar as the order was concerned, you will recall that at the argument that I asked whether there was any dispute about the fact that he had not in fact paid, made the installment payment. There was no dispute about that.

MR.CORWIN: Your Honor, I agree with you 100 per cent that there was not a dispute that he has not made these payments. I do think, though, that under Rule 14(b) of this court that he has put in issue his misconduct, not because he hasn't paid, which he admits he hasn't paid, but his misconduct; he's shown misconduct, because he does

not have the ability to pay right now. And I think that 14(b) is clear that at any time he can put in issue before this court his alleged misconduct. I tried in my affidavit that was sworn to on December 8th and which I submitted to your Honor at the return date of plaintiff's motion. In that affidavit I put in issue at that time his ability to pay.

THE COURT: I think that you were required to put that in issue if you were going to put it in issue, before the installments became due under my order of October 30th, and to have made some further indication of it. You did not. Proceed.

MR. CORWIN: My position is and I have cited for you the case of McDonald v. Birrell, which is a federal case in the Second Circuit, which I think indicates that a modification can be sought of an installment order at any time. I also base my motion on your Honor's fourth finding of fact of today which states as follows:

"At no time subsequent to the entry of the order on October 30, 1975 and prior to the return date of this motion on December 9, 1975, did the defendant move or otherwise take any steps to explain or represent to the Court any reasons why he could not comply with the order and make the payments required thereunder."

My response to that, your Honor, is twofold. First of all, as I said in my affidavit of December 8th which is submitted to you on the 9th, I tried to raise that issue.

Second, Mr. Annis filed a notice of appeal with the Second Circuit on November 25, 1975, one of his grounds of his appeal is the constitutionality of this installment payment order and the fact that no evidentiary hearing had been held. That is my position.

MR. KOVNER: Your Honor, just briefly in response, this is, at the outset I'd like to say this is the fifth application for essentially the same relief. He was granted this relief in effect by the Court of Appeals on his third application for the other condition he filed a supersedeas bond in the amount of $50,000 by December 15th, which he filed today. I think there is no dispute about that. I am troubled too, your Honor, by the service of these papers. I learned late this morning that our adversary was going to make a motion on papers. We asked, and there has been up until this point a cooperative spirit here, although given the difficult facts, but we were denied the opportunity to see these papers until just a few minutes ago. But having reviewed them quickly, I make the following observations, in seeking any kind of stay

without a bond they are in effect asking this court, your Honor, to in effect overrule the Second Circuit whereon essentially the same facts they fixed at a supersedeas bond of $50,000. Interms of how we brought this motion on, we brought the motion for contempt on by service on defendant's attorneys in accordance with Rule 14 of the Civil Rules of this district. There is no question that the defendant had notice of the terms of the order. Their notice of appeal from the order was dated November 21st. The defendant himself had spoke with me over the past few days,told me that he knew about the order, he understood its terms, and he thought that the appeal process would somehow alleviate him of his obligations. I am shocked, your Honor, that I read in this affidavit that the check was sent on November 7th or 2nd by defendant's attorneys, but that the order wasn't sent with the check to the defendant. I am shocked about that, but apparently he got it in some other way. There is no question he had notice of it. In terms of the hearing, he had the opportunity to offer new facts on a number of occasions. None of the facts set forth on these papers are new. They were all before your Honor in the initial motion. We respectfully urge that this motion be denied..

THE COURT: The motion is denied. I will endorse it.

(Time noted: 2:45 p.m.)

DSA-125

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WEITNAUER TRADING COMPANY, LTD., 71 CIV 782 (RLC)

Plaintiff-Judgment Creditor

- against - NOTICE OF APPEAL

MORTON L. ANNIS

Defendant-Judgment Debtor

----------X

SIRS:

NOTICE is hereby given that MORTON L. ANNIS, Defendant-Judgment Debtor above named, hereby appeals to the United States Court of Appeals for the Second Circuit from a certain order of the United States District Court for the Southern District of New York, made and entered herein December 18, 1975, granting the Plaintiff-Judgment Creditor's motion for an order punishing the Defendant-Judgment Debtor for contempt of an installment payment order entered in this Court on October 30, 1975 and directing Defendant-Judgment Debtor's confinement in the New York Metropolitan Correction Center until payment of a fine and costs, and from the whole of the said order.

Dated: December 18, 1975

RICH, KRINSLY, POSES, KATZ &
LILLIENSTEIN,
Attorneys for Defendant-Judgment
Debtor
99 Park Ave.,
New York, New York 10016

NORTON I. KATZ
MEMBER OF THE FIRM

TO:
LANKENAU, KOVNER & BICKFORD, ESQS.
Attorneys for Plaintiff-Judgment Creditor
30 Rockefeller Plaza,
New York, New York 10020

Service of 1 copies of the within
Supplemental Appendix admitted this
9 day of January 1976.
Victor A. Kovner - Lankford Norman & Richford
ATTORNEY FOR Plaintiff - Respondent
Defendant - Appellant